LAW OFFICES
BROENING OBERG WOODS & WILSON
PROFESSIONAL CORPORATION
POST OFFICE BOX 20527
PHOENIX, ARIZONA 85036
(602) 271-7700
Donald Wilson, Jr. (005205)
John W. Oberg (003445)
Terrence P. Woods (003490)
Brian Holohan (009124)
Attorneys for Respondent Andrew Thomas

BEFORE THE PRESIDING DISCIPLINARY JUDGE

OF THE SUPREME COURT OF ARIZONA

In the Matter of a Member of the State Bar of Arizona,

ANDREW P. THOMAS
Bar No. 0014069,

Respondent.

NO. PDJ 2011-9002

RESPONDENT THOMAS'S POST HEARING MEMORANDUM

TABLE OF CONTENTS

INTRODUCTION

"We have found a witch! May we burn her?"
Monty Python and the Holy Grail (Sony Pictures 1974)

In the first five minutes of his opening, Independent Bar Counsel ("IBC") made his mindset very clear:

> The evidence will show that following virtually every dispute with Mr. Thomas there is retribution, whether a judge, a member of the Board of Supervisors, or a private lawyer. If you disagreed with, ruled against, or represented someone in one of the disputes, the evidence will show retaliation by Mr. Thomas or Ms. Aubuchon. Tr. 09/12/2011, pp. 5-6.

This is but one in a long string of over-blown accusations made in a case that, ironically, charges that Mr. Thomas went too far in the performance of his job. When put to his proof, IBC did not just fail to show that "virtually every dispute" resulted in revenge; he failed to prove that any of them did.

With the exception of the legitimate prosecutions of Supervisors Stapley and Wilcox, IBC largely abandons the political revenge theme in his Closing Argument memorandum (hereafter "CAM"). Thus, even though the Panel was subjected to hours of pointless testimony about the so-called Spanish speaking courts, Proposition 100 and the Arizona meth project, no effort, none, is made in the CAM to tie those non-events to any relevant issue in this case.

IBC does still try to make a political-revenge case involving the indictment of Supervisor Stapley in Stapley I,

but that charge falls flat on its face. In his opening statement, IBC contended that the political ill-will between Mr. Thomas and Supervisor Stapley began in 2006, and consisted of "many disputes" including the "hiring of outside counsel." *Id.*, p. 6. Nevertheless, the evidence at hearing showed that the initial (and only) dispute in 2006 began when then-Chairman Stapley unlawfully tried to hire outside counsel to advise the Board, not take control of outside litigation counsel. Yes, Mr. Stapley eventually tried to hijack the appointment of outside counsel to exert leverage, and, yes, a lawsuit was eventually filed, but the dispute was resolved to everyone's satisfaction shortly after it began. The evidence also shows that the agreement worked reasonably well right up to the point it was scheduled to expire in 2008 -- so well in fact that neither side had to invoke the MOU's notice-and-cure default provisions.

In other words, there was no ongoing political infighting in 2007 and 2008 that could be used to manufacture a revenge motive. Which is, of course, the most obvious flaw in the political-revenge theory. If that were not enough all by itself, the indictment-for-political-retribution theory was belied further by Mr. Thomas's number two, Phil MacDonnell, who testified that he told Mr. Thomas, a Republican, that it would "destroy [him]" to indict Supervisor Stapley, a fellow Republican. Tr. 09/15/11, pp. 148-9. Mr. Lotstein, another senior aide, testified that Mr. Thomas "didn't care, that he

wasn't concerned about the politics, he was concerned about whether or not these guys had broken the law, or Mr. Stapley had broken the law." Tr. 10/24/11, p. 42.

Mindful that the relatively peaceful, two-plus year passage of time between the MOU and the Stapley I indictment is inconsistent with his political revenge theme, IBC tries to manufacture a second causative dispute: IBC now posits for the first time that Mr. Thomas indicted Supervisor Stapley in 2008, "[in] retaliation for his actions in 2006 when, from Thomas's perspective, Stapley had led [sic] to various lawsuits against the County during his 'unusual chairmanship.'" CAM at 10. Mr. Thomas did indeed think that Stapley's stewardship resulted in an increase in litigation against the County -- including lawsuits brought by other county officials -- but how does that translate into some kind of inference that Mr. Thomas was motivated to retaliate, much less to wait two years to do so? Like so much else in this case, IBC never says.

The evidence of political retribution against Supervisor Wilcox is virtually non-existent. Indeed, if the Panel will carefully read that section of IBC's CAM, it will find that her name is mentioned only once, and only as part of the sheepish concession that "charges ... might have been appropriately filed by another prosecuting office[.]" CAM at 23. It defies reason to contend that Mr. Thomas was improperly motivated when prosecuting someone, even a person

with whom he had political disputes, in a situation in which charges "might have been appropriately filed." But trying to cast everything Mr. Thomas did with a pall of evil intent has been a staple of IBC's two-year campaign.

Then there is the theory of revenge advanced as to the 2009 Stapley II and Wilcox prosecutions. IBC argues that Mr. Thomas must have been improperly motivated by the time his office indicted Supervisors Stapley and Wilcox because of the internecine conflicts between the MCAO and the Board of Supervisors that occurred during the year before the indictments. Of course this charge is made despite the fact that IBC does not dispute (largely because it cannot) that there was probable cause to support the charges in Stapley II and Wilcox.

This "what came before must have been the cause of what came after" theory of proof has a name: post hoc fallacy.[1] This error of reasoning, sometimes also referred to as false cause or coincidental correlation, is widely discredited because it wrongly assumes that a temporal relation translates into causal relation.[2] Tellingly, it is the kind of "proof" favored by the media.

That the political-revenge theme seems only a means to try to justify an end is reinforced by IBC's continuing

---

[1]This is a short-hand reference to the Latin phrase "post hoc, ergo propter hoc," which means "after this, therefore because of it."

[2]*See*, *e.g.* www.logicalfallacies.info/presumption/post-hoc/

efforts to argue that Lisa Aubuchon was out for revenge. It is not our place to argue Ms. Aubuchon's case, but the lack of proof of improper motive as to her only reinforces our point as to Mr. Thomas. As to Ms. Aubuchon, the sum total of IBC's case is to impute political ill will to her merely because (to IBC's thinking) Mr. Thomas had improper motives. To compound matters, IBC makes this charge despite the fact the evidence shows Ms. Aubuchon is a non-political person.

The failed political-retribution theory is not the only sensational position IBC took as a substitute for actual evidence. At every turn, IBC tried to tie Mr. Thomas with Sheriff Arpaio, as though they were for these purposes (or any other) inextricably intertwined. What purpose, really, did the mind-numbing evidence about the dispute between the Sheriff and the courts over the transportation of prisoners (a dispute in which Mr. Thomas and his office were totally uninvolved) serve?

IBC even called Sheriff Arpaio and his former chief deputy, David Hendershott, to testify despite the fact neither advanced IBC's cause, and in some instances hurt IBC's case. For example, Mr. Hendershott testified that Mr. Thomas gave a great deal of careful consideration to pursuing the case against Judge Donahoe before authorizing it. Tr. 10/13/11, pp. 101-2. The effort to try to tar Mr. Thomas with the Sheriff's and Hendershott's public relations peccadilloes, rather than prove actual improper motive on Mr.

Thomas's part, is still more reason to call into question IBC's case.

No spin is too outrageous, or too baseless. For example, early on in IBC's CAM it charges that it had become "clear" that Mr. Thomas lost objectivity within a year of taking office. CAM at page 4. This statement is not only untrue, but no person fairly looking at the evidence would think it "clear," IBC's favorite, over-used adjective.

Finally, IBC's CAM is silent on its burden of proof. The Bar is obligated to prove its case -- every element -- by clear and convincing proof. Supreme Court Rule 58(j)(3). To satisfy this standard, the Bar's evidence must establish that its allegations are "highly probable." *In re Weiner*, 120 Ariz. 349, 353, 586 P.2d 194, 198 (1978).

> The clear and convincing standard is reserved for cases where substantial interests at stake require an extra measure of confidence by the factfinders in the correctness of their judgment, though not to such degree as is required to convict of crime.

State v. Renforth, 155 Ariz. 385, 387, 746 P.2d 1315, 1317 (App. 1987).

Whatever else might be said for his case, it cannot be said that IBC proved by clear and convincing evidence (or any other evidentiary standard for that matter) that Andrew Thomas was deliberately abusing his office for political revenge. Were mistakes made? Certainly some were, but in the final analysis what occurred in the turbulent last years of Andrew Thomas's administration was not a campaign of

terror rained down by Mr. Thomas on his enemies. He genuinely thought he was fighting widespread corruption. Unfortunately for him, he had powerful, Machiavellian adversaries aided by a judiciary hostile to his office. The demand for his disbarment, like so much else in this case, is an overblown request by an ambitious prosecutor -- yet another irony in a case rife with them.

OVERVIEW

Rather than address the charges count-by-count, this memo is organized by topic. Thus, there are separate sections for Stapley I, Stapley II/Wilcox, the so-called Court Tower investigation, the case against Judge Donahoe and the RICO case. The memo begins with a miscellaneous section addressing the throw-in claims. The actual counts involved are identified in the headings. For ease of reference, a separate index lists the counts in numerical order with the sections and page numbers in which that count is addressed.

I. MISCELLANEOUS

A. Chinese Wall representation (Count 6)

Count 6 charges that ER 3.3(a)(1) was violated because it was "dishonest to state that there was a 'Chinese Wall'" in a pleading filed by Ms. Aubuchon in the Stapley I criminal case. CAM at 10. The dishonesty allegedly arises, IBC claims, because it was intended to "convince Judge Fields that there was no conflict in MCAO because the civil division was walled off from the criminal divisions." *Id.* It should

be easy to get accurate something as simple as the person to whom the representation was made; the filing containing the statement (exhibit 248A) was actually directed to the Presiding Criminal judge, not Judge Fields, because there was at the time a motion seeking Judge Fields's recusal or disqualification.

Nevertheless, the Panel should read the statement in full, in context, rather than IBC's assertions about it:

> The State is not intending to use any communications between any attorney in the Maricopa County Attorneys' Office and the defendant, nor is there any information to believe that any statements relating to this case were ever made or advice ever given. The civil division has informed the County Attorney that during the last four years, no deputy county attorney has been asked by any Supervisor, including the defendant, to assist or advise that Supervisor in the preparation of their individual financial disclosure forms. Regardless, the prosecution is not seeking to use any such confidences in this case. There has been and is a "Chinese wall" between the criminal and civil division of the County Attorney's office in the prosecution of this case.

Exhibit 248A, pp. 6-7 (Bates 7950-1).

Read in context, the Chinese wall reference could not have misled the court, or thought to have been made with that intent. The Chinese wall reference was made after repeated assurances that no client confidences existed, or would be used. We agree with IBC that there was a great deal of testimony about the MCAO's practice in this regard, but what IBC forgets (or chooses to ignore) is that the evidence was nearly uniform that the unwritten practice in fact existed,

was known to exist by all concerned and was, in fact, observed in the Stapley case. In short, it was not an unfair description of the practice (which, by the way, was put in quotes in the filing to signal to the reader the expression was not being used in any literal way) to say a Chinese wall existed.

In that regard, IBC's position is not only wrong factually, but also misses the mark for another reason. For the use of the expression "Chinese wall" to be a false "statement of fact," that expression would have to have a universally accepted meaning. Stated another way, the statement was false only if its use to describe the MCAO's practice was contrary to the way the expression is understood by all reasonable persons. On that point, the fact that IBC felt the need to supply a definition of "Chinese wall" from Black's Law Dictionary rather undercuts the notion that every person would understand the expression to mean only one thing. If the definition was so universal, why cite a dictionary?

But all of this is academic as to Mr. Thomas. We are not criticizing Ms. Aubuchon for using the expression, but she is the one who wrote and signed the filing. Mr. Thomas literally did not make the representation. So why is Mr. Thomas charged with violating ER 3.3(a)(1)? According to IBC, Mr. Thomas "adopted [Ms.] Aubuchon's statement as his own and is equally culpable." CAM at 10. Put aside for the moment that we can

find no legal authority anywhere in all of reported jurisprudence that countenances IBC's theory of vicarious liability-based discipline for "adopted statements" and that IBC has supplied no such legal authority. Where is the evidence that Mr. Thomas "adopted" this statement? Again, IBC never says. Tellingly, no record citation is supplied by IBC to support its proposed finding of fact (¶124) that includes this "fact."

B. Representation that Judge Fields filed a Bar charge against Respondent Thomas (Count 7)

Count 7 is a closely related charge to Count 6, and is equally meritless. As noted in the previous section, Ms. Aubuchon filed a motion that combined a request directed to Judge Fields to recuse himself and a motion pursuant to Criminal Rule 10.1 in the event Judge Fields refused to recuse himself. Exhibit 27. In a paragraph heading, Ms. Aubuchon wrote:

> Judge Fields is the complainant in an open and pending State Bar matter that he initiated against County Attorney Thomas.

The paragraphs that follow accurately describe the fact Judge Fields filed a Bar charge, and that the Bar required Mr. Thomas to respond. The Bar charge itself was attached to the filing for the judge to read. In short, IBC wants the Panel to mete out punishment because an argument heading (not the memo itself, an argument heading) slightly overstates the import of Judge Fields's Bar charge.

ER 3.3(a)(1) prohibits knowing misrepresentations. Where is the evidence that Ms. Aubuchon knew she was misstating a fact, rather than making an innocent blunder? The answer, as it so often is in this case, is nowhere. The fact Ms. Aubuchon attached the actual Bar charge to the filing itself totally dispels the myth that she was knowingly trying to mislead anyone.

Of course, this count, like count 6, suffers from the same lack of culpable conduct on Mr. Thomas's part. He no more adopted this statement (whatever that is supposed to mean) than he adopted the benign, Chinese wall statement in count 6.

C. Subornation of perjury (count 27)

Count 27 relates to the verification by Detective Almanza of the direct complaint in the Donahoe criminal case. This is another instance where IBC continues to press a histrionic allegation despite the fact the proof at trial fell far short of the alleged wrongdoing.

In the complaint, IBC alleged that "Thomas and Aubuchon knew the complaint was to be signed by Detective Gabriel Almanza under oath," ¶494, and engaged in criminal conduct because they "caused another ... to engage in perjury." ¶498. One would expect that IBC had some basis to support both of those allegations when filing this case, but whatever the basis was, it was contrary to the evidence at hearing. Detective Almanza denied believing that what he signed was

false. Tr. 10/11/11, pp. 133-34. Both he and Ms. Aubuchon also testified that Ms. Aubuchon had no idea that Det. Almanza would be the person signing the complaint. Tr. 10/11/11, p. 136, 174-5; tr. 10/25/11, p. 199.

If Ms. Aubuchon did not know that it would be Det. Almanza, not Sgt. Luth, signing the complaint, how did IBC ever think it proper to charge Mr. Thomas with such knowledge?

IBC nonetheless presses forward with a new theory. First, IBC charges that Ms. Aubuchon knew that anyone signing the direct complaint would be engaging in perjury because she supposedly knew that "someone who had no knowledge" would verify the direct complaint. CAM at 27. This position ignores the conversation, testified to by Ms. Aubuchon, Sgt. Luth and Det. Almanza, in Ms. Aubuchon's office during which Ms. Aubuchon laid out for the officers the factual background of the complaint. Tr. 10/11/11, pp. 127-8, 147, 185; tr. 10/14/11, pp. 175-6; Tr. 10/25/11, p. 196.

It also ignores that Det. Almanza's verification was based merely "on information and belief." Exhibit 163 (Bates 1906). As Sgt. Luth testified, when directing Det. Almanza to verify the complaint:

> [T]he question they're going to ask you is is the information in this complaint true and correct to your best of your knowledge and belief, and I said you can answer that question truthfully and say yes."

Tr. 10/14/11, pp. 119-120.

It is bad enough that IBC continues to press this meritless claim against Ms. Aubuchon, but the efforts to make Mr. Thomas culpable are even more inappropriate still. Rather than admitting its inaccuracy, rather than concede no one suborned anyone to commit perjury, IBC now claims that Mr. Thomas committed a violation because he "adopted this direct complaint as his own when he attended the news conference about charging Judge Donahoe and attached the direct complaint to the News Release." CAM at 27. IBC does not explain how the elements of perjury are satisfied by "adoption," but the "adoption" occurred after the alleged perjury. What is the basis for this retroactive imposition of criminal liability? IBC never says.[3]

D. Conflict of interest re 2006 advice on counsel issue (count 1).

The first count of the complaint charges Mr. Thomas with violating the conflict of interest rules for issuing the Spring 2006 series of opinion letters trying to dissuade then-Chairman Stapley from trying to self-appoint a lawyer to represent the Board. Exhibits 6-10. Despite the fact that the Board has had scores of lawyers since 2010 (when the complaint was filed), none of whom complained about this

[3]It is yet another irony in the life of this case that IBC asks the Panel to punish Mr. Thomas for allegedly making unfounded accusations of criminal conduct despite the fact IBC himself has made unfounded accusations against Mr. Thomas that Mr. Thomas engaged in criminal behavior.

conduct, despite the fact Mr. Thomas was subjected to multiple Bar investigations before the one culminating in this proceeding, none of which ever even hinted that these letters were (or ought to be) an issue, and despite the fact Mr. Thomas appointed an outside lawyer for the Board to give them advice on the subject, IBC now claims almost six-years-after-the-fact that Mr. Thomas was self-interested as to the issue of counsel, and therefore had a conflict.

By statute, the County Attorney (which is a position created by the Arizona Constitution) is the legal advisor to each county's Board of Supervisors. A.R.S. §11-532(A)(9). The County Attorney must "[w]hen required give his written opinion to county officers on matters relating to the duties of their office." §11-532(A)(7). Mr. Thomas, an elected official with statutory duties, was obligated to advise the Board of Supervisors on the legality of what it was they were proposing to do, even though the thing the Board was trying to do related to Mr. Thomas's office.

ER 1.7(a)(2) precludes a lawyer from representing a client if "there is a significant risk the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." According to IBC "[t]here would have been no problem with Thomas [sic] giving such advice except that he had a significant personal interest in the matter." CAM at 5. In other words, IBC is trying to make the case that Mr. Thomas had a personal interest in

discharging his constitutional and statutory responsibility merely because the advice related to his office's functions.

Where is the evidence that Mr. Thomas was any more interested in the advice he was giving than any other county attorney? Taken to its logical end -- a short journey -- IBC's position is necessarily that no county attorney could ever give conflict-free advice to a county board of supervisors if the advice related to the county attorney's role as lawyer for the county.

Beyond the lack of self-interest, the application of the conflict rule requires more than simply a determination that the lawyer has a personal interest; the determination must also be made that a significant risk exists of a material limitation on the lawyer's ability to represent the client. In the case of Mr. Thomas's 2006 disputes with the Board over the hiring of lawyers, there was no "substantial risk" that the objectivity of Mr. Thomas's advice was materially limited merely by the fact the opinions related to the Board's efforts to hire other lawyers.

Nor is the fact Mr. Thomas was telling the Board something that 3 of the 5 Supervisors did not like and did not want to hear enough to meet the definition of "conflict." Disagreements, while perhaps creating conflicts in the laymen's sense, do not create a "conflict" under the Rules of Professional Conduct. Lawyers give clients advice all the time that clients dislike and disregard. Far more than IBC

proved is required before a conflict under the Rules is created. IBC must show that Mr. Thomas had a personal interest in the substance of the advice such that it created a significant risk that his representation was materially limited.

This arranged-marriage between elected officials has not always been a happy one, especially in Maricopa County. Indeed, over thirty years ago, a majority of the Maricopa County Board of Supervisors and the then-County Attorney became embroiled in litigation over the Board's hiring of outside counsel to advise the Board. The dispute erupted when the County Clerk refused to pay the outside lawyers after being advised by the County Attorney not to.

Sound ***exactly*** like this case?

The Arizona Supreme Court rejected the Board of Supervisors' naked grab for power. After reviewing other reported appellate cases involving litigation between Boards of Supervisors and County Attorneys over the hiring of outside counsel, the Court held the Board lacks the authority to "employ private counsel to advise the Board and other county officers or employees" and therefore lacked the power to expend county funds to pay the unlawfully hired counsel. *Bd. of Supervisors of Maricopa County v. Woodall*, 120 Ariz. 379, 381-82, 586 P.2d 628, 630-31 (1978). *Woodall* had been on the books for nearly thirty years by the time Mr. Thomas gave his opinion.

Woodall does more than simply establish that Mr. Thomas's advice that the Board could not wholesale replace him was correct. The case recognizes that the County Attorney and the Board will from time-to-time have disputes over the hiring of outside lawyers. The Court nowhere holds that the County Attorney has a conflict for doing his job by challenging such efforts by the Board.

It cannot be emphasized enough that Mr. Thomas ultimately provided the Board with outside counsel on this issue. We do not know what that lawyer told the Board, but we do know that even after the lawyer was hired, the Board pressed forward basically daring Mr. Thomas to sue. How was the representation "materially limited" when the client deliberately ignored the advice anyway, even after getting an independent lawyer? We also know the dispute was ultimately settled by the MOU. The terms of the MOU memorialize the arrangement Mr. Thomas had been telling the Board ever since Chairman Stapley ambushed Mr. MacDonnell and tried to deceive him into signing the I-want-to-confirm-an-agreement-we-never-made letter (exhibit 251). The most reasonable inference one can draw is that the outside lawyer told the Board that Mr. Thomas was right.

That Mr. Thomas did not commit an ethical violation in 2006 by expressing an opinion on the issue whether the Board could replace him is reinforced by *Romley v. Daughton*, 225 Ariz. 521, 241 P.3d 518 (2010). The first part of the *Romley*

v. Daughton opinion discusses the process by which the parties are to resolve future disputes. Again, this judicial recognition that the County Attorney and the Board will not always see eye-to-eye on the appointment of counsel means the County Attorney does not have a conflict merely by having a contrary opinion. That there was not per se a conflict merely because the parties disagreed is bolstered by the Court's reversal of the trial court's determination there was an across-the-board conflict.

Where is any evidence of any of the culpable mental states required by the ABA Standards? Mr. Thomas's number two, Phil MacDonnell, was involved in the situation. Mr. MacDonnell, who is obviously a thoughtful lawyer who gave counsel to Mr. Thomas on such issues, did not see a conflict. Tr. 9/15/11, pp. 87-88. If Mr. MacDonnell did not see it, why is it so unreasonable for Mr. Thomas not to have thought it was appropriate to opine on this subject?

In its proposed findings of fact, IBC claims Mr. Thomas "knew" he had a conflict. ¶37. IBC urges the Panel to draw this conclusion from the fact Mr. Thomas eventually appointed outside counsel for the Board. In essence, IBC wants the panel to decide that Mr. Thomas's decision in April is some retroactive proof of his beliefs in February and March. The claim is dubious enough, but Mr. Thomas explained the decision to appoint outside counsel was made when it became clear that he was going to have to sue the Board over the

issue, not because he realized he had a conflict from the outset. Tr. 10/26/11, pp. 211-213.

E. The 2006 news release (count 2)

Count two relates to the June 14, 2006, news release (exhibit 13). The news release related, in part, to lawsuits filed against the County by Sandra Dowling and Philip Keen, and in part to the dispute Mr. Thomas had with the Board over the Board's efforts to hire outside lawyers, in non-conflict situations, to handle a wide range of county legal work in violation of A.R.S. §11-532(A)(9). Count Two charges Mr. Thomas violated the client confidence rule of ER 1.6.

For information to be a client confidence under ER 1.6, the information must be "relating to the representation," that is, the lawyer learned the information in the course of representation or as the result of the representation. 1G. Hazard, et al., THE LAW OF LAWYERING §9.5 at 9-18 (3d ed. 2004 supp) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §59 (2000)). The statements Mr. Thomas made as to the Keen and Dowling lawsuit turned out to be client confidences.

We say "turned out" because Mr. Thomas learned for the first time at hearing in this case that lawyers in the MCAO civil division had been involved in the Keen and Dowling disputes before litigation was filed. At the time of the news release, he was totally unaware of that. No witness contradicted him on that point. Mr. MacDonnell did not counsel against the disclosure. IBC's proposed findings do

not even suggest a culpable mental state -- a tacit concession he made an innocent mistake.

IBC chides Mr. Thomas for not "check[ing] with his own deputies whether MCAO had advised the Board and what that advice had been[,]" (proposed finding 42), but the fact the Civil Division was involved on either side of an intra-county dispute was contrary to the office's policy to assign outside counsel in such circumstances. Tr. 10/26/11, pp. 21-22. Mr. Thomas had no reason to even suspect his office had been involved. In short, the fact client confidences were disclosed was not done with any culpable mental state under the ABA standards.

Admittedly, Mr. Thomas was aware that he had been trying to advise the Board on the counsel issue. His news release accurately concedes as much. The disclosure was thus not inadvertent. Nevertheless, as to that disclosure, ER 1.13, the rule relating to the lawyer for an organization, "trumps" ER 1.6. Hazard, §9.2 at 9-18.

ER 1.13 provides in relevant part:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> * * *
>
> (c) Except as provided in paragraph (d), if
>
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or refusal to act, that is clearly a violation of law, and

> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization
>
> then the lawyer ***may reveal information relating to the representation whether or not ER 1.6 permits such disclosure***, but only if and to the extent the lawyer reasonably relieves necessary to prevent substantial injury to the organization. [Emphasis added.]

ER 1.13, sometimes referred to as "reporting out" or the "loyal disclosure" rule, is a codification of the notion that the entity, not management, is the lawyer's client, and sometimes the lawyer must take extraordinary measures to protect the entity:

> In essence, the lawyer has been authorized to go above the head of the highest formal authority in the organization, by appealing to the shareholders of a corporation, for example, or by providing information to regulators. The assumption is that if outside influence is brought to bear, a change of course may yet be possible, avoiding the looming harm to the company or other organization. In each instance, however, the Rule conditions disclosure, as well as the extent of the disclosure, on the lawyer's reasonable belief that it is "necessary to prevent substantial injury to the organization." This is consistent with the thematic concern of Rule 1.13 with maximizing the ability of entity lawyers to protect the interests of entity clients.
>
> * * *
>
> Because "reporting out" disclosures under Rule 1.13(c) are for the benefit of the (entity) client, they might be referred to as well as "loyal disclosures." That is they are designed to rescue the entity from its predicament of having disloyal servants within, and at least inattentive or overly timid servants at the helm.

Hazard, §17.12 at 17-45 to 17-46 (footnotes and emphasis omitted).

Here, Mr. Thomas had advised the Board, on multiple occasions that the Board was proposing to break the law. The Board insisted on going forward. The Board's insistence cost the County taxpayers money, both in terms of funds spent on outside lawyers to try to unsuccessfully defend the Board's conduct and in County funds unlawfully paid to unauthorized outside lawyers, and had the potential to cost the County a lot more money. Both Mr. Thomas and the Board members are elected public officials, which means they answer to the voting public, rather than shareholders. Mr. Thomas believed that the voting public, his and the Board's "bosses," had a right to know what was occurring so that the voting public could choose if it sought fit to replace the Supervisors who were knowingly breaking the law. This belief by Mr. Thomas about the identity of his ultimate client and ultimate loyalty was both objectively reasonable and subjectively held by him at the time of the statements.

IBC offers no theory of culpable mental state as to this alleged violation. IBC argues that Mr. Thomas's conclusion about ER 1.13 was wrong, but even if IBC is right, more is required. IBC must also prove by clear and convincing evidence that Mr. Thomas's belief about the applicability of ER 1.13 was so wrong as to constitute a culpable mental state. On that point, IBC's papers are silent.

. . .

. . .

F. Extra-judicial statements (counts 3 and 11)

IBC, never satisfied charging a single violation, also seeks to cast the June 2006 press release (but only as it relates to Keen and Dowling) as a violation of the limitations on extra-judicial statements contained in ER 3.6. For good measure, IBC makes the same allegation as to the August 2009 news release issued following Judge Fields' dismissal of multiple counts of the Stapley I indictment. Exhibit 243.

Not all extrajudicial statements are prohibited. Lawyers have First Amendment rights. ER 3.6(a) instead limits the prohibition to extra-judicial statements "that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Prohibited extrajudicial statements are the kind that "entail[] a substantial likelihood of material prejudice, that is, where lay factfinders or a witness would likely learn of the statement and be influenced in an inappropriate way." RESTATEMENT §109, comment c.

ER 3.6's "legislative history" derives from the United States Supreme Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), a watershed opinion that, like the text of ER 3.6(a) itself, receives no mention in IBC's CAM. Gentile, a Nevada criminal lawyer, held a press

conference hours after his client was indicted. He read from a prepared statement, and then took questions, although he declined to answer many questions. In reversing Nevada's discipline authority, the Court noted that some of the statements for which Gentile was disciplined were made long before the case went to trial. *Id.* 1044. The Court, citing *Patton v. Yount*, 467 U.S. 1025 (1984), reiterated that "the timing of a statement was crucial in the assessment of possible prejudice and the Rule's application[.]" *Id.* at 1044. The Court went on to note the inflammatory things Gentile declined to address, both in his prepared statement and press conference: polygraph tests; confessions (or lack of them); results of police forensic testing; and he refused to elaborate on his charge that other alleged victims were not credible. *Id.* at 1046.

Despite approving the "substantial likelihood of materially prejudicing an adjudicative proceeding" standard in former ER 3.6, *id.* at 1036, the Court nonetheless reversed Gentile's discipline because Gentile "spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal law." *Id.* at 1033.

Gentile reflects the effort to balance a lawyer's First Amendment rights, on the one hand, with the Court's legitimate desire to conduct fair trials on the other. As

originally formulated, ER 3.6(a) contained the prohibition against statements that a lawyer knew or should reasonably know have a substantial likelihood of materially prejudicing a trial, but also modified that standard with so-called safe harbors, which the *Gentile* Court found unconstitutionally vague as applied. The ABA amended ER 3.6(a) following *Gentile* in an effort to address the safe harbor provisions. According to Professor Hazard, "the ABA swung the pendulum decisively in the direction of free speech rather than fair trial." Hazard, §32.4 at 32-9 (2011 supp).

Under the 2002 amendments to ER 3.6(a), a lawyer can be disciplined for extra-judicial statements only if four conditions are met:

a) The lawyer must actually be participating (or, in Arizona, have participated in the past);

b) The lawyer must actually know that the extrajudicial comments will be disseminated by the media;

c) The lawyer must actually know or reasonably should know that the communications, if disseminated, will have a substantial likelihood of materially prejudicing a proceeding; and,

d) the proceeding affected must be an adjudicative one. *Id.*, at 32-11 to 12.

June 14, 2006 news release (count 3)

IBC'S CAM makes so little effort to establish any of the elements as to this news release, one wonders why it

continues to pursue the charge. As noted, Mr. Thomas was unaware that his office represented the Board of Supervisors in the Keen and Dowling disputes. For that reason, every one of the "knew or should have known" elements is lacking.

Beyond that, IBC makes no effort, none, to provide any temporal information about the Keen and Dowling lawsuits as of June 24, 2006, an essential element under *Gentile* for determining if the "substantial likelihood of materially prejudicing an adjudicative proceeding" test is met. Beyond that, any prejudice from Mr. Thomas's statements (had the matters even gone to a jury trial) could be cured by voir dire and with the standard instruction to jurors to ignore press coverage. *In re Sullivan*, 586 N.Y.S.2d 322, 326 (App.Div. 1992).

August 2009 news release (count 11)

Once again, IBC's papers make a woefully inadequate showing of the circumstances under which Mr. Thomas's statements were made. In the first place, his comments were about a ruling by a trial judge, a ruling he believed (quite correctly) would lead the prosecutor handling Stapley I to dismiss the rest of the charges to pursue an appeal. How was he supposedly materially prejudicing a soon-to-be-dismissed case? IBC, of course, never says.

Nor can IBC claim Mr. Thomas somehow prejudiced the yet-to-be-filed appeal. Because the goal of ER 3.6(a) is to balance First Amendment rights with fair trial concerns, "it

is hard to imagine any extrajudicial statements" could violate ER 3.6(a) as to bench trials or appeals. Hazard, §32.5 at 32-11.

> Judges are routinely exposed to material that is later excluded from evidence or not in the record, and are professionally trained to put it out of mind. This is not to praise or condemn lawyers who utilize the media to comment on pending non-jury cases that they are involved in; it is merely to say that the practice will not trigger charges under Rule 3.6(a).

Id. at 32-12.

The charge that Mr. Thomas violated ER 3.6(a) in his news release fails for an additional reason: His comments about Judge Fields's ruling fall within the safe harbor provision of ER 3.6(b)(4).

G. 2009 letters to various county officials directing them not to pay the Shugart Thomson firm's bills (count 12)

This is a horse IBC changed in mid-stream.

Count 12 of the complaint charges that Mr. Thomas violated ER 4.4(a) in late 2008 "by sending letters to Supervisor Kunasek and other county employees threatening them that the payment to [outside counsel hired by the Board] would be unlawful and subject them to action to recover the funds from them personally." This was done, IBC charged, "for the sole purpose . . . to intimidate and to burden county employees and Mr. Irvine." Complaint at ¶273. In the CAM, the theory that the letters (discussed in more detail below) were sent to "intimidate and burden" county employees

is abandoned. In its place, the new claim is that the letters were sent to interfere with the attorney/client relationship between Mr. Irvine and the Board. CAM at 16.

No matter how they are spun, the letters were motivated by a legitimate purpose. Indeed, in still another irony, it would appear that IBC, not Mr. Thomas, is obsessed.

The letters in question were sent by Mr. Thomas in response to the Board's efforts, shortly after the indictment of Supervisor Stapley, to fire the MCAO. The December 5, 2008 letter from Mr. Thomas to then-Board Chairman Kunasek (exhibit 40) says only the following on the issue of paying an outside law firm unlawfully engaged:

> I urge you to cancel this Executive Session and accompanying Open Meeting item, and to consult with the Civil Division of the County Attorney for legal advice unless and until a conflict on a particular item is declared by the County Attorney. If you proceed with this action item to appoint outside counsel to perform a duty that the Constitution of Arizona entrusts to the County Attorney, you will be putting the Board in a very precarious position of performing an illegal act. Likewise, doing so ***may*** subject the Board to actions under A.R.S. §11-641 or §11-642 for recovery of monies illegally paid.

Id., Bates 1160 (emphasis added).

All three letters sent to the then-Acting County Manager, County Treasurer and County Chief Financial Officer are in trial exhibit 66. The letters demand that warrants (a form of payment used by the County) not be issued to the outside law firm that the Board had (in Mr. Thomas's view) unlawfully hired. The letters go on to state:

> Should any such warrants issue, their issuance ***may*** give rise to actions under A.R.S. §§11-641 or 11-642 for recovery of monies illegally paid. ***In that event***, you would not be entitled to the immunity provisions of A.R.S. §38-446.

Id. at Bates 1309 (emphasis supplied.)

ER 4.4(a), IBC's favorite substitute for a real ethical violation, prohibits a lawyer from "us[ing] means that have no substantial purpose other than to embarrass, delay, or burden another person[.]" ER 4.4(a) does not prohibit all conduct resulting in embarrassment or burden. Rather, ER 4.4(a) prohibits only employing means "for no substantial purpose other than" embarrassment or burden.

Accepting for the purpose of this argument that sending a letter is "means," the letters' purpose, as stated in the letters, was to put County officials on notice of the County Attorney's view of the potential consequence of paying bills the County Attorney believed were unlawfully incurred, which is a perfectly appropriate purpose. Lawyers send letters setting forth legal positions that warn of adverse consequences all the time. They send them to clients and foes alike. Moreover, the County Attorney is statutorily obligated to "oppose claims against the county which he deems unjust or illegal." §11-532(A)(9). Section 11-641(B) requires the County Attorney to bring actions against the Board "and others liable" if the Board orders any money paid from the county treasury "without authority of law[.]" Warning county officials of the actual, potential adverse consequences is a

legitimate, substantial purpose for sending the letters. That, after all, is why the County Attorney in *Woodall* sent a nearly identical letter during that dispute. Because the letters have a legitimate, substantial purpose, no violation was proved.

II. STAPLEY I

A. The alleged violation of ER 4.4 (count 4)

IBC continues to doggedly pursue discipline against Mr. Thomas for prosecuting Mr. Stapley despite the fact Sheila Polk, the Yavapai County Attorney, testified that both she and Mel Bowers (a former Navajo County Attorney) thought Mr. Stapley had committed "clear cut violations of the law." Tr. 10/19/11, p. 68. Because IBC seems to view his role to obtain some discipline, any discipline, against Mr. Thomas at any cost, he has sought to cast the charging decision in Stapley I as unethical by accusing Mr. Thomas of violating the obscure prohibition[4] in ER 4.4(a) against using means "for no substantial purpose other than" to burden or embarrass, rather than the more direct prohibition of ER 3.8.

We will get to IBC's "proof" of Mr. Thomas's alleged desire to embarrass and burden later in this section, but at

---

[4]In yet another irony, IBC cites as "proof" of Mr. Thomas's improper motives that he brought charges against Supervisor Stapley "that no one ever remembers ever being charged against a member of the Board." It is at best debatable that the evidence at hearing would support such a sweeping statement, but what is not debatable is that the efforts to impose discipline upon Mr. Thomas for the decisions he made as a prosecutor are unprecedented.

the outset the Panel should note that the "for no substantial purpose other than" verbiage is essential to understanding, and applying, the prohibition. "Some measure of embarrassment, delay, and burden is inherent in litigation." RESTATEMENT §106, comment e. The limitation is intended to address only those situations in which "an advocate lacks a substantial purpose for conduct having those consequences[.]" *Id*. Obviously, a prosecutor pursuing a criminal case supported by probable cause is a "substantial purpose" under any definition. This is such an obvious proposition, that no Bar prosecutor has ever tried to claim otherwise, which is also (one has to suppose) why there are no reported Bar discipline cases analyzing this self-evident notion.

IBC has consciously avoided this essential limitation on ER 4.4(a) at every turn. In the CAM, IBC relies on *In re Levine*, 174 Ariz. 146, 847 P.2d 1093 (1993) for the supposedly "clear" proposition that "a lawyer still violates [ER 4.4(a)] if he files otherwise proper charges when the substantial purpose of doing so is to embarrass or burden another." CAM at 9. In the first place, the actual standard in ER 4.4(a) is "for no substantial purpose other than," an entirely different standard than "the substantial purpose of" wrongly argued by IBC. The ER's language requires the exclusion of any other purpose; IBC's formulation makes it a violation if burden or embarrassment is merely a purpose.

. . .

Beyond that, IBC misreads the *Levine* Court's statements about ER 4.4. The ER 4.4 analysis is contained in a section that is entitled "Ethical Standards for Frivolous Suits," and begins by noting that Levine's "first attack on all counts alleging violations of ER 3.1 is that the [C]ommission incorrectly applied a subjective standard in determining various claims were frivolous, rather than an objective standard of the reasonableness of his legal theories." *Id.* at 152, 847 P.2d at 1099. The next several paragraphs confirm that a lawyer's subjective state of mind is relevant. It is in the context of the importance of the lawyer's subjective state of mind that the Court quotes ER 4.4, and then notes:

> Thus, even where respondent claims that an objectively arguable ground for a legal claim exists, his subjective purpose in bringing the action is relevant to whether a violation of ER 4.4 occurred. Therefore, we find no error in the [C]ommission's analysis of respondent's personal motives in bringing these claims in its consideration of whether he had violated ER 3.1 and 4.4

Id. at 154, 847 P.2d 1101.

The Court was not saying ER 4.4 is violated if the action was objectively meritorious. Given the fact the Court affirmed the Commission's finding that Levine's claims lacked merit and were without a good faith basis, the issue of whether ER 4.4 can be violated if the action was objectively reasonable was not before the Court. The Court was merely noting that subjective intent is relevant to determining

whether violations occurred. The factfinder has to delve into the lawyer's intent to decide whether there was a substantial purpose to what the lawyer did. Where, as in Levine's case, a good faith basis for the claim is lacking, that substantial purpose is lacking as well.

Despite the PDJ's prior ruling, IBC's presentation seeks to paint Supervisor Stapley as an innocent man, wrongly accused, from which one is supposed to infer Mr. Thomas's improper motives. Supervisor Stapley is anything but. The Panel should review exhibits 35, 246, 304, 509 and 510. These documents, received into evidence without objection, harpoon the notion that Supervisor Stapley was a victim. Moreover, two of the criminal charges (counts 48 and 103) dealt with his failure to disclose a bankruptcy filing, see tr. 10/11/11, p. 36; exhibit 36, charges unrelated to Mr. Stapley's performance of his duties as a Supervisor. Then, there is that fact that a few days after Cmdr. Stribling approached Fran McCarroll (the Clerk of the Board) to get Mr. Stapley's disclosures, Mr. Stapley filed new disclosures with much of the omitted evidence now disclosed -- evidence of consciousness of guilt. *Id.*; Exhibit 509 and 510.

The bottom line is that IBC seeks to discipline Mr. Thomas for indicting someone whose indictment was perfectly proper.

The case against Mr. Thomas is said to be made, in part, by the process leading up to the indictment. So, for

example, Mr. Thomas is accused of being so obsessed with Mr. Stapley that it "reached the point where Thomas acted not on evidence, but on vague and unsubstantiated rumors." CAM at 7. Of course, neither part of that is true. We debunked the revenge motive (presumably the basis for the histrionic "obsession" accusation) in the Introduction. Too much time passed between the minor dustup in 2006 over hiring counsel and 2008, when Supervisor Stapley was indicted, for anyone to reasonably conclude revenge was afoot.

The political-revenge motive is further undercut by the uncontroverted testimony that Mr. Thomas directed Ms. Aubuchon to hold off indicting Supervisor Stapley until after the 2008 election so as not to interfere with his re-election bid. Tr. 10/26/11, p. 238. If revenge was the motive as IBC claims, the indictment would have come down during the election season.

As for investigating unsubstantiated rumors, many prosecutions start out with rumors. One man's "rumor" is another man's "tip." The whole point of an investigation is to substantiate a charge or not. There is no question that the charges against Supervisor Stapley were eventually investigated, and determined to be supported by probable cause. But by making this argument, IBC is again skirting the line, set by the PDJ early on at IBC's request, that Mr. Stapley's actual guilt was off limits to us.

. . .

IBC's other proof that the indictment was improperly motivated purports to be substantive, but is anything but. It is also another irony. IBC urges the Panel (CAM at 9) to infer Mr. Thomas had an improper purpose in Stapley I merely from the number of counts in the indictment. Yet, IBC figured out a way to plead the claim that it was improper to charge Judge Donahoe with a crime six different ways, including charging Mr. Thomas with engaging in criminal wrongdoing by violating a 19th Century federal civil rights law. IBC also urges a finding of improper motive because of "how far back the charges went," CAM at 9, even though Mr. Thomas is now charged with alleged offenses that are almost six years old.

B. Bringing charges allegedly barred by the statute of limitations (count 9)

IBC alleges in the complaint that charges were brought against Mr. Stapley knowing some of them to be time barred. Complaint, ¶149. "Knowing" under ER 1.0(f) denotes actual knowledge of the fact in question. IBC's theory is that Mr. Thomas went forward with time-barred misdemeanor charges despite having a case of what Sheila Polk and Mel Bowers agree were multiple, valid felony charges. What prosecutor (especially one as obsessed as IBC tries to paint Mr. Thomas) deliberately puts good felony charges in jeopardy for lesser misdemeanor charges?

. . .

IBC says Mr. Thomas did that because of obsession, but another of IBC's positions contradicts that already-questionable argument. IBC says that Mr. Thomas assigned Stapley I to Ms. Aubuchon in March 2008, and told her that he wanted "the matter done" in a month. CAM at 13, ¶¶ i and j. IBC theorizes elsewhere that Mr. Thomas "kn[ew] that law enforcement knew or should have known no later than May 2007 that there was probable cause that Stapley had committed crimes about his financial disclosures." CAM at 14. So IBC is saying that there was time enough to bring these charges, a directive to timely bring them, but then for some inexplicable reason the charges were allowed to languish for seven more months by an obsessed prosecutor despite a running statute. Where is the sense in that?

In any event, Mr. Thomas admitted he gave Ms. Aubuchon a short fuse, but not for the reason ascribed by IBC. He gave her a short deadline because it had been his experience matters languished unless he imposed deadlines. Tr. 10/26/11, pp. 237-238. When he held off filing the charges until after the election cycle, Mr. Thomas was unaware that there was any statute of limitations controversy. Tr.10/26/11, pp. 235-6, 238.

IBC's case on statute of limitations turns on the notion that the fact Mr. Stapley had violated the financial disclosure laws was known in 2007, when Mark Goldman obtained some copies of one of Mr. Stapley's disclosures.

Nevertheless, Mr. Goldman did not pull the disclosures to verify their accuracy, but rather to see if there was a tie between Supervisor Stapley and Mr. Irvine. Tr. 10/12/114, p. 136, 138-9, 167.

The evidence of what was known or even knowable from the single disclosure Goldman pulled was all over the lot. The differences in recollections are all by itself inconsistent with the clear and convincing burden of proof imposed in Bar discipline cases, but the most trustworthy, compelling evidence comes from Vicki Kratovil's notebook. Time and again, her notebook documents that in 2007, the MACE team was looking into other financial irregularity charges against Supervisor Stapley, not the veracity of his financial disclosures. Her contemporaneous notes all by themselves dispel IBC's charges, but in the absence of some compelling, credible explanation from IBC, her notebook single-handedly means IBC failed to carry its burden.

In its proposed findings, IBC claims Mr. Thomas "admitted that the information Goldman found triggered the statute of limitations on one of those charges." ¶160. Typically, no citation to the record is included to verify the accuracy of this representation. At the hearing, Mr. Thomas said he was uncertain if the statute was triggered on the one disclosure Mr. Goldman found:

> Q. Did you recognize in 2007 that the information that Mr. Goldman gave you about Mr. Stapley's financial disclosures triggered the running of the

statute of limitations?

A. No.

Q. No?

A. No. Correct.
Q. Doesn't it trigger it with regard to at least one of the disclosure forms that Mr. Goldman had found of Mr. Stapley?

A. I'm not certain.

Tr. 10/26/11, p. 126. He went on to say that he did not think that discovery of the single financial disclosure in 2007 would trigger the statute as to the other disclosure statements. *Id.*, p. 128. Mr. Thomas also testified that he seldom attended MACE meetings, had no idea what criminal conduct, if any, the singe disclosure found in 2007 documented or whether the 2008 case would be a felony or misdemeanor. He not only was unaware of any actual or putative statute of limitations problem when he authorized going forward in November 2008, but he testified he did not concern himself with those issues, deferring to the line prosecutor instead. Tr. 10/26/11, p. 238.

As to this count, Mr. Thomas is not charged with violating the more stringent, more objectively-defined standard of ER 3.8(a), but is instead charged with violating the squishy, amorphous standard of engaging in conduct prejudicial to the administration of justice in violation of 8.4(d). Trying to defend against such a charge is a little like wrestling with Jell-O; like pornography, "prejudicial to

the administration of justice" seems to be determined on an "I know it when I see it" standard, to borrow from former Supreme Court Justice Potter Stewart. The chilling effect on prosecutors is Orwellian.

So why would IBC pick ER 8.4(d), rather than ER 3.8(a)? The only reason we can discern is that IBC consciously decided not to allege a violation of ER 3.8(a) as part of his campaign to avoid at all costs a discussion of the merits of the criminal case against Supervisor Stapley. This is still more evidence of IBC's efforts to obtain discipline against a former prosecutor, who rightly brought meritorious charges, for no better reason than the prosecutor was unpopular in some powerful quarters.

C. Conflict of interest allegations (count 5)

In Count Five, IBC alleges that Mr. Thomas had a conflict of interest prosecuting Supervisor Stapley. The conflict arises, IBC claims, because Supervisor Stapley was a "client." Thirty-one years ago, the Court of Appeals held in *State v. Brooks*, 126 Ariz. 395, 616 P.2d 70 (App. 1980) that it was not a conflict for a County Attorney to criminally prosecute a member of a county board that the County Attorney's office represents. "We thus reject [the defendant's] contention that simply because he was an elected member of the governing board of the MCCCD he was a 'client' of the Maricopa County Attorney." *Id.* at 399, 616 P.2d at 74.

Even the partisan Tom Irvine admits that when representing the Board, the individual Board members -- the "constituents" to use the term of art -- are not themselves personally his client. Tr. 09/14/11, p. 192.

This remains the rule of law today. It remains the practice. There have been multiple prosecutions of State and County employees and elected officials by the Attorney General's office and various County Attorneys in the intervening years. The Evan Mecham criminal prosecution (handled by one of Mr. Thomas's deputies, who told him about the Mecham case before Mr. Thomas decided he could prosecute Mr. Stapley) stands out. Even Mr. MacDonnell, Mr. Thomas's number two, had prosecuted a state official while at the Attorney General's office.

The underpinnings of the *Brooks* bright-line rule lie in the constitutional and statutory framework governing the office of the County Attorney. The County Attorney is charged with providing advice to a multitude of County Boards. He is also charged with being a County's chief law enforcement officer. The *Brooks* rule exists to avoid situations, like this one, where an unscrupulous Board member tries to conflict the County Attorney out of a case by falsely claiming to have thought he or she personally was also a client.

The Bar lacks an argument that a conflict exists for another reason: We have scoured the hearing transcript, and

can find no place where Stapley claims to have thought he was personally an MCAO client -- either because he allegedly received advice about how to fill out his financial disclosure forms or otherwise. If the panel rejects over thirty years of settled jurisprudence in *Brooks*, IBC still has to prove that Mr. Stapley genuinely thought he was a client. And that proof has to be by clear and convincing evidence.

Judge Fields weighed in on the argument Mr. Stapley is somehow a client of the MCAO merely because he is a Supervisor:

> A reasonable person in the Defendant's position when soliciting legal advice and assistance from the civil deputies about business ventures that could be conflicts of interest and/or would be reportable on the elected official's financial disclosure statements would have been aware that the Maricopa County Attorney is also a prosecuting agency in addition to acting as the legal advisor for the Board of Supervisors. This is not a situation where the Defendant first engaged a private attorney for legal assistance, divulged confidences and later was prosecuted by the same attorney on the same matters.
>
> It was not reasonable under the circumstances here for Defendant to expect that the Maricopa County Attorney was his attorney on all matters. The legal advice and assistance from the civil deputies related to Defendant's role as a member of the Board of Supervisors. As Mr. Wolcott, the former civil deputy, pointed out, the individual legal assistance was only given to individual members as necessary to further the business of the Board of Supervisors, the County Attorney's client.

Exhibit 104, at Bates 1447.

Which segues into probably the most outrageous position IBC has taken in this case. At pages 9-10 of the CAM, IBC urges the Panel to "resolve" an issue that "[n]o attorney

discipline case has addressed" to "instruct the Bar[.]" In other words, the IBC claims is unsettled, and wants the Panel to impose discipline on Mr. Thomas so that prosecutors from now on will know the rule. What happened to the notion that discipline was supposed to be imposed only when lawyers broke existing rules with some kind of culpable mental state they were breaking existing rules? Since when did the Bar discipline system become a forum for test cases?

At bottom, this is a tacit concession by IBC that Mr. Thomas's view, which, among other things, was based upon a 2007 opinion from a former judge about the propriety of prosecuting County officials[5] and an opinion from one of the country's leading ethics experts,[6] is not unquestionably wrong. Barnett Lotstein also told Mr. Thomas he did not have a conflict. Tr. 10/24/11, pp. 40, 57-9. Plainly, reasonable minds could differ on the issue. "Reasonable minds could differ" is the antithesis of negligence and every other culpable mental state under the ABA Standard.

To find IBC carried his heightened burden of proof, the Panel would have to be prepared not only to reject Judge

---

[5]Mr. Thomas testified about the 2007 opinion he received from former Presiding Criminal Judge William French about the propriety of prosecuting County Officials. 10/27/11, pp. 13-15; exhibit 19, Bates 500.

[6]After Supervisor Stapley moved to disqualify the MCAO from Stapley I prosecution, Peter Jarvis, one of the editors of the Hazard treatise, was brought in. Mr. Jarvis was also of the view it was not a conflict for the MCAO to be prosecuting Supervisor Stapley. Tr. 10/26/11, pp. 37-8.

Fields's conclusion that Supervisor Stapley did not have a reasonable belief that he personally was an MCAO client, but also reject the conclusion of a retired judge engaged for the very purpose of telling Mr. Thomas if he could proceed. Two of his deputies -- both prosecutors with experience prosecuting officials -- told Mr. Thomas it was permissible to prosecute Stapley. How many more people will it take before IBC concedes Mr. Thomas's view he did not have a conflict was proper?

III. FAILURE TO COOPERATE (COUNT 33)

The failure to cooperate charge receives the same short shrift in the CAM that it received at trial. So it will not receive much mention here. IBC's one-paragraph argument labels a variety of filings the Respondents made, while represented by 14 lawyers (one of whom was also trial counsel), as "meritless, frivolous and dilatory[.]" No analysis of the filings is put forth in the CAM, just as the substance of the filings was ignored at hearing. The sum total of the basis to conclude the filings were improper is that the motions were "denied." IBC claims this behavior violates former Rule 53(d)[7] and warrants discipline, although he never says what that discipline ought to be.

---

[7]IBC also charges Respondents with violating former Rule 53(f), which provided that the failure to provide information is also a violation. Whatever else IBC may have proved by putting the motions and special actions into evidence, he did not prove that anything was withheld as the consequence of these filings.

Former Rule 53(d) provided that it was grounds for discipline for a lawyer to refuse to cooperate. Putting aside for the moment that the mere fact a motion is unsuccessful does not mean it is "meritless, frivolous and dilatory," how is filing motions and special actions a refusal to cooperate? IBC is literally suggesting that any lawyer who dares to defend him or herself during the investigation phase commits a violation. One would expect that basic due process entitles a lawyer, who is not guilty until charges are proved, to try to defend against charges he or she feels are unwarranted. Abject surrender cannot be the standard for cooperation.

This charge, pressed on IBC by the Probable Cause Panelist,[8] brings to mind Justice Zlacket's warning about a system that punishes people for defending themselves:

> Respondent's "failure to acknowledge" the wrongful nature of his conduct, a finding affirmed by the majority as an aggravating factor, appears to have originated in large part from the aggressive defense advanced by his attorneys. I fear that today's opinion sends an erroneous message to those facing the disciplinary process -- that if they dare to challenge the charges against them, the consequences may be more severe than if they simply confess wrongdoing and pray for mercy. There is something demoralizing and destructive in such a message, something that violates the very spirit upon which our legal system is premised.

---

[8]IBC's probable cause recommendation was made to the specially-appointed Probable Cause panelist in November 2010. The report contained no mention of the alleged failure to cooperate, and did not seek approval to pursue such charges. The Probable Cause Panelist *sua sponte* directed IBC to make the allegation.

In re Shannon, 179 Ariz. 52, 81-82, 876 P.2d 548, 577-8 (1994) (Zlacket, J., dissenting).

IV. COURT TOWER/BUG SWEEP INVESTIGATIONS

Although they encompass two different time periods, the charges set forth in counts 13, 14 and 21 all relate to two grand jury investigations. Counts 13 and 14 relate to the so-called Court Tower investigation. Count 21 arises out of the so-called Bug Sweep investigation. Count 13 contains yet another tired, worn charge that Mr. Thomas and Ms. Aubuchon violated ER 4.4 because the only purpose of the grand jury subpoena was to burden and embarrass. Counts 14 and 31 accuse them of conflicts of interest.

A. The purpose of the grand jury subpoena (count 13)

At the outset, we need to clarify yet another of IBC's sloppy factual assertions. At page 16 of the CAM, IBC asserts that "Thomas and Aubuchon issued a grand jury subpoena to the County . . . about ten days after the Board had hired Irvine." In the first place, lawyers do not issue grand jury subpoenas. Grand juries authorize them; clerks issue them. In the second place, the grand jury subpoena was procured by Ms. Aubuchon, not Mr. Thomas.

Obviously, we are not criticizing Ms. Aubuchon for seeking a grand jury subpoena. But by lumping Mr. Thomas and Ms. Aubuchon together, IBC side-steps the significant problem with his theory: Ms. Aubuchon was not improperly motivated to do anything. She was merely doing her job as her boss

expected her. For his part, Mr. Thomas was relying on Ms. Aubuchon. She did not have the political axe to grind that IBC constantly (and wrongly) charges Mr. Thomas had. The fights following Supervisor Stapley's indictment had yet to escalate by the time the subpoena was secured. Ms. Aubuchon had yet to be clawed by the tiger that had been grabbed by the tail.

In any event, as we have noted more than once, ER 4.4 merely prohibits conduct, intended to embarrass or burden, if it lacks any other substantial purpose. The substantial purpose here was to get records to (to put it in IBC's terms) substantiate or not the Court-Tower-for-hiring-Irvine tip that had been received from two different sources. Could the records be obtained other ways? The answer is irrelevant, because getting documents by way of a grand jury subpoena -- which because it is a grand jury subpoena, normally suggests a higher level of accuracy in compliance -- is a legitimate use of the process. The purpose was proper.

IBC makes a curious concession at page 16 of the CAM: "Never did [sic] Aubuchon or Thomas consider the effect this subpoena would have on their own client, the County." If that were so, how can IBC charge they were motivated by a desire to harass and burden? They were inadvertently harassing and burdening? IBC cannot have it both ways.

For the record, yes, the potential burden on the County was not a factor in the decision to seek the records. But

neither was it the motivating goal, as IBC fantasizes. The Board's decision to hire Mr. Irvine underscored what appeared to be criminal patronage, and to that extent played a role in the decision to investigate, but no, the purpose for subpoenaing records was not to retaliate against Mr. Irvine -- whose law firm earned "millions of dollars" -- or the Board itself.

B. Conflict of interest (counts 14 and 31)

1. Court Tower

As he does so often, IBC seeks to cast everything Mr. Thomas did as infected with conflict. As noted in the previous section, Ms. Aubuchon, not Mr. Thomas, secured the grand jury subpoena. She did that within a matter of days of Mr. Irvine being hired. The real brawling did not begin until after he became involved. Ms. Aubuchon had no interest, real or imagined, in how the Board secured civil litigation counsel (she was, after all, a criminal division chief) so what was her personal interest at the time the subpoena was requested?

IBC claims the MCAO could not conduct a grand jury investigation of the Court Tower because "MCAO represented the County on the Court Tower and Thomas and Aubuchon were involved in the Court Tower planning process." The latter point is not even part of a proper conflict analysis. Why the first part, the MCAO's involvement in giving civil advice to the County, does not create a conflict for the MCAO under

State v. Brooks when conducting criminal prosecutions, is analyzed in Section II(C), dealing with Stapley I.

The other reason no conflict existed -- there was no link between whatever civil advice was being given by the MCAO to county personnel and the Court Tower criminal investigation -- is addressed in detail in the "factual underpinnings" portion of the Section of this memo addressing the criminal charges against Judge Donahoe. Pp. 61-63. We will not repeat it verbatim here, but summarized, no conflict existed for two reasons. First, neither the Board, nor the County were subjects of the criminal investigation; persons who were not MCAO clients were. Neither the Board nor the County could even be charged with a crime. Second, whatever advice the MCAO gave had nothing to do with the hire-Irvine-to-get-your-court-tower corrupt patronage charge that was being considered.

How was the representation materially limited? How would a non-conflicted lawyer have handled the matter, a seemingly essential explanation for determining whether the way Ms. Aubuchon handled it was improper? IBC never says. If IBC concedes that a non-conflicted lawyer would have sought the records, either by subpoena or records request, where is the improper purpose? If, on the other hand, he is suggesting a non-conflicted lawyer would not have requested the subpoena, how was the claimed-to-be-improper-from-the-start legal work materially limited?

2. Bug sweep

The bug sweep grand jury investigation[9] is said to be a conflict because of the pending RICO case. This putative conflict is addressed in detail, in Section V(B), which follows. That analysis is incorporated here, by reference.

V. STAPLEY II/WILCOX

A. Improper purpose (count 22)

As in the case of Stapley I, IBC charges that Mr. Thomas's purpose in bringing the second round of criminal charges against Supervisor Stapley, and the indictment of Supervisor Wilcox, was improper in violation of ER 4.4(a). All of what we said in the section addressing Stapley I about the correct application of ER 4.4 applies here as well. Mr. Thomas had a substantial purpose in both prosecutions: Both cases were more than amply supported by compelling evidence of guilt, evidence generated before Mr. Thomas's office sought indictments.

The MCSO began an investigation of Supervisor Wilcox on May 12, 2009, because of a Phoenix Magazine article entitled "A Rose By Any Other Name." The article alleged that Ms. Wilcox had failed to publicly disclose loans her business had received (and which she and her husband had personally guaranteed) from a subsidiary of Chicanos Por La Causa, a

[9]Count 31 actually refers also to the grand jury proceeding that was being conducted after Judge Donahoe was charged by criminal complaint.

county contractor who had also recently received government funds, distributed by Maricopa County. Supervisor Wilcox voted to approve the disbursement of those funds without disclosing the obvious conflict. Ex. 284.

An investigation by the MCSO ensued. She was indicted, initially, on December 7, 2009, and then indicted a second time on January 25, 2010. Exhibits 160-161, 174 and 193.

Following the indictment in Stapley I, MCSO investigators continued to look into Supervisor Stapley's business dealings. Additional evidence was gathered about loans, campaign accounts and Mr. Stapley's dealings with the Arizona Real Estate Department. Among other things, a § 1031 real property exchange-transaction was found; as a consequence of that swap, Mr. Stapley received approximately $15,900 per month from August 2004 to July 2007 under an option. The option payments increased to approximately $25,900 per month beginning August of 2007, and continued until July 2008.[10]

On May 19, 2009, Sheriff's investigators began a detailed investigation into Mr. Stapley's affiliation with NaCO, the National Association of Counties, a non-governmental association. Investigators learned that Mr. Stapley had actively solicited funds from private donors under the

[10]It was these option payments that played a role in the subpoena served on the Wolfswinkel companies. That set of events is discussed in detail in the section relating to the criminal charges against Judge Donahoe, Section VII, *infra*.

premise of running for the position of NaCO's Second Vice-President. Mr. Stapley received donations totaling almost $140,000, even though, it turns out, he ran unopposed for the position. Investigators determined that Mr. Stapley used a significant portion of the funds for personal expenses. At least $10,000 was received after he was already elected. Exhibit 306.

Mr. Stapley was indicted the second time, in December 2009, on the strength of this investigation.

That Supervisors Stapley and Wilcox escaped prosecution would seem unjust to most, but if protecting the public is the goal of Bar discipline, how is the public, already denied its measure of justice, going to be better off by punishing the prosecutor who brought just charges to bring criminal wrongdoers to justice? How is the public better served when the criminal wrongdoer escapes punishment for no better reason than the criminal wrongdoer is a powerful politician? It is precisely for this reason that IBC has avoided at all costs the indisputable, inconvenient-for-the-Bar fact that Supervisors Stapley and Wilcox deserved to be indicted.

B. Conflict of interest (counts 21 and 23)

IBC charges that Mr. Thomas had a 1.7(a)(1) conflict because he was representing one client (the State) against another alleged client in those prosecutions. For all the same reasons we explained in Section II(C) that no such conflict existed as to Stapley I, so too there was no

conflict prohibiting Mr. Thomas from prosecuting Stapley II and Wilcox. Supervisors Wilcox and Stapley personally were not MCAO clients.

Two additional things should be noted. First, the judge hearing Supervisor Wilcox's claim of conflict noted that she filed a declaration to the effect that she received advice concerning her financial disclosures from Chris Keller of the MCAO but that Mr. Keller denied giving such advice -- just as he did at the hearing. Tr. 10/17/11, p. 67. Faced with this conflict, Judge Leonardo concluded that "the evidence before the Court does not establish that Defendant [Wilcox] was given legal advice relating to the filing of financial disclosure statements[.]" Exhibit 199, Bates 2381-2. The Panel should reach the same conclusion. How can the Panel conclude that IBC produced clear and convincing evidence of a conflict when Judge Leonardo, who heard the same evidence, concluded the proof was lacking, and made that finding employing a less stringent burden of proof than IBC must satisfy?

The second thing the Panel should note is that the claim Supervisor Stapley was Mr. Thomas's client as to Stapley II is totally unsustainable because Stapley II had nothing to do with Stapley's financial disclosures. It had nothing to do with Mr. Stapley's functions as a supervisor. It instead dealt with his solicitation and use of funds to run for a position with NaCO. Mr. Stapley has never claimed he

received advice from the county Attorneys' office in connection with that purely personal endeavor.

IBC adds a second conflict charge as to these prosecutions: Because, IBC reasons, Supervisors Stapley and Wilcox were defendants in Mr. Thomas's RICO action, he had a conflict prosecuting them under ER 1.7(a)(2). IBC's position on this claim is that the mere fact Mr. Thomas was suing Supervisors Stapley and Wilcox in the RICO action for damages,[11] without more, means he committed an ER 1.7(a)(2) violation as a matter of law because his office was at the same time prosecuting Supervisor Wilcox.

ER 1.7(a)(2) requires a showing that there is "a significant risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer[.]" As an initial matter, Mr. Thomas was not himself the lawyer handling either the Stapley II or Wilcox prosecution.[12] So how could his non-existent representation be materially limited? IBC never says. How were Ms. Aubuchon's efforts impacted, or even at risk of being impacted, because

---

[11]The characterization of the complaint as seeking damages is debatable. Read as a whole, it is clear the RICO complaint was seeking relief in the nature of equitable relief, although admittedly, there are some passages that suggest a damage claim allegation.

[12]As will be explained in Section VI(B), *infra*, Mr. Thomas was not representing any client in the RICO action either.

her boss was pursuing a civil action against Ms. Wilcox? So far, IBC has never been able to explain that either.

IBC cites Judge Leonardo's ruling to support the notion there was conflict. Judge Leonardo relied on *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972), a case addressing imputed disqualification. And while it is true that the *Latigue* Court cites avoiding the appearance of impropriety as a basis for disqualification, this is a common-law derived standard. The then-applicable Ethics Code is neither cited nor analyzed in *Latigue*.

In effect, *Latigue* is a judge-created, not-based-in-the-ethics-rules limitation on prosecutors. And it has nothing to do with whether the prosecutor's representation of the state will be materially limited.

Turbin v. Superior Court, 165 Ariz. 195, 797 P.2d 734 (App. 1990), cited in *Latigue*, is equally unsupportive of IBC's view. While *Turbin*, yet another case dealing with imputed disqualification, cites the Rules of Professional Conduct dealing with imputed conflict, the court's decision does not turn on them. The court instead cites *Latigue*'s appearance of impropriety standard. Importantly, the court goes on to hold that it is "impossible to formulate a bright line rule in this area," *id.* at 199, 797 P.2d at 738, and cites a variety of factors involved in applying the appearance of impropriety test, none of which are rooted in ER 1.7 or the Rules.

In short, *Latigue* and its progeny set forth a common law rule, separate from the Rules of Professional Conduct, which can result in a prosecutor's disqualification without regard to the rules, but cannot form the basis for a charge that a violation of ER 1.7(a) occurred.

VI. RICO

A. Merits of the RICO suit (counts 16, 17, 19 and 20)

IBC alleges that the RICO lawsuit was meritless (count 16), but was nonetheless incompetently handled (count 17). IBC adds two more merits-related charges to the mix: an alleged violation of ER 3.4(c) (for suing people immune from suit) and an alleged violation of ER 8.4(d) (for suing judges for carrying out their duties).

Each will be treated in turn. As an initial matter, though, it needs to be emphasized that Mr. Thomas's name appeared in the caption of the RICO suit. He was a party to the action, not one of the lawyers prosecuting the case. Tr. 10/26/11, pp. 54-55.

At hearing, IBC took the absurdist position that the fact Mr. Thomas's name appears in the address block, and is part of the typed signature blocks, means he was personally counsel of record. Of course, we all know that his name appeared in those places for all the same reasons his name (and the name of every county attorney before and after him) appears on court filings: He is the holder of the office that filed the action. Neither Mr. Thomas, nor any of his

predecessors or successors, can be said to be representing a client as to every single case commenced or defended by the MCAO any more than it could have been said of Frank Snell when he was alive that he personally represented every one of the thousands of Snell & Wilmer clients in court merely because his "name was on the door," to use the vernacular.

Yes, Mr. Thomas read and offered editorial comments about the RICO complaints. He, like most all lawyer clients, wanted to look over his lawyer's shoulder. But offering input did not make Mr. Thomas his own lawyer, or Sheriff Arpaio's lawyer. Others in the office were tasked with that responsibility. The old adage about a lawyer representing himself did not go unheeded here.

Let us address the ERs 3.1 and 1.1 together. It seems a little incongruous to charge both. After all, if the claim was really as meritless as IBC charges, who really cares if it was also pursued incompetently? Is IBC saying the pursuit of the RICO charge would pass Bar discipline muster if it was done competently?

The comments to ER 1.1 note that the factors that go into determining a lawyer's competence "include the relative complexity and specialized nature of the matter[.]" IBC felt the need to prove the RICO complaint was incompetently drafted by flying in (from the East coast, no less) what had to be one of the most knowledgeable RICO experts in the country. We concede Professor Goldstock's considerable

expertise because it makes a point about competence: If one has to be as knowledgeable as Professor Goldstock, then no lawyer could ever bring a RICO case. Is that really the statement IBC sought to make? The Panel may recall that Professor Goldstock termed RICO "amazingly complex," an extremely challenging area of the law even for seasoned attorneys. Tr. 10-19-11, p. 160.

The same comment to ER 1.1 goes on to explain how a lawyer can satisfy the competence requirement:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar ... Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

The evidence at hearing showed that considerable legal research was done before the action was filed. Considerably more research was done after. Peter Spaw, who, because of his position in the MCAO, was thought to be competent, was enlisted to help -- despite his duck-for-cover denials. We will never know if the judge hearing the RICO case would have found the amended complaint deficient. What we do know is that, even according to Professor Goldstock, a proper case could be pled. *Id.*, pp. 162-5. Given that, one can assume that the judge hearing the RICO case would have allowed

another pleading to cure whatever deficiencies existed -- a not uncommon situation in RICO litigation. *See id.*, p. 160.

What we do not know from Professor Goldstock is whether the claim itself had merit. This is because his opinions were confined (no doubt by the lawyers who hired him) to the quality of the pleading and involved no evaluation of the factual allegations.

> Q. Did you consider any or did you review any of the factual allegations in the complaint in the first amended complaint to determine whether they were accurate?
>
> A. No.
>
> Q. You accepted those as true?
>
> A. Yes.
>
> Q. Did you consider any issues in reaching any conclusions that were raised by the defendants in their motions such as judicial immunity?
>
> A. No, I limited my analysis solely to the question of whether or not the basic RICO concepts were laid out properly in the two complaints.

Tr. 10/19/11, p. 138. Notably, Sheriff Arpaio's Washington, D.C. lawyer, Robert Driscoll, a lawyer with real-world experience litigating RICO claims, testified that in his view, the complaint satisfied Rule 11. Tr. 10/27/11, p. 123.

Counts 19 and 20, alleging respectively violations of ER 3.4(c) (prohibiting the knowing disobedience of an obligation under the Rules of a tribunal) and conduct prejudicial to the administration of justice, are throw-ins. The RICO action was brought under federal law, in federal court, seeking the

protection of the federal system. Under the Supremacy Clause, and with all due respect to the Arizona Supreme Court, state law immunities cannot trump federal RICO law, a point even Professor Goldstock conceded. *Id.*, p. 170. The Bar proceedings immunity rule and judicial immunity do not bar claims under federal RICO statutes, and IBC, the person with the burden of proof, has come forward with no legal authority that they do.

Beyond that, where is the clear and convincing evidence that Mr. Thomas knew that Supreme Court Rule 48(l) confers immunity on persons making Bar charges? Those of us who regularly practice in this arena know of the Rule, but the overwhelming majority of the Bar does not know the Rule exists. How many different lawyers who worked on the RICO complaint missed the issue? While ignorance of the law is no excuse, it is the opposite of "knowing." And ER 3.4(c) prohibits only knowing, not unintentional or even negligent, rule violations.

While judicial immunity is a more familiar concept to the average practitioner, judicial immunity does not protect a judge from everything he or she does. Judicial immunity is not a defense to a criminal charge, as evidence by the conviction of the Pennsylvania judge who pled guilty to felony charges stemming from sentencing youthful offenders to private facilities in exchange for kickbacks from the facility's operator. We are not here perpetuating the

allegation that judges sued in the RICO case in fact committed crimes. Our point only is that it was not unreasonable for Mr. Thomas or the multiple other MCAO lawyers who worked on the case to believe that judicial immunity would not shield the named judges from a federal racketeering case.

B. The charge that the RICO suit was filed to burden (count 15)

Professor Goldstock admits that one of the remedial purposes of RICO -- a body of law, he notes, that the United States Supreme Court has time and again said has a broad and liberal purpose -- could be to address public corruption. *Id.*, p. 163. Whatever else the Panel might conclude about the merits of the RICO case, it simply cannot be disputed that Mr. Thomas in fact thought it was a last-resort effort to deal with an extraordinary situation. Might his situation have been a function of reactions by the bench and the BOS to his well-intentioned efforts to fight what he saw as corruption? Perhaps, but that does not change the fact of his perception. ER 4.4 prohibits conduct that is motivated by nothing more than a desire to burden or embarrass. Whatever the panel thinks of the reasonableness of Mr. Thomas's belief in his purpose, burden and embarrassment were not among them.

. . .

. . .

C. Conflict of interest (count 18)

Throwing in a conflict of interest allegation is a consistent arrow in IBC's quiver. He accuses Mr. Thomas of unethically pursuing a case that, IBC claims, should never have been filed in the first instance, and then piles-on by claiming Mr. Thomas's representation was also infected by conflict -- as if that is going make the allegedly unethical conduct worse.

What we said in section VI(A), above, about the fact Mr. Thomas was a litigant, not a lawyer representing a client, applies equally here, but the other point that needs to be made (again) is that the lawyer's personal interest is a conflict only if it carries with it the substantial risk of materially limiting the representation. How is the pursuit of a case IBC says should never have been filed ever materially limited?

VII. PROSECUTION OF JUDGE DONAHOE

A. Background

IBC insists time and again that charges were brought against Judge Donahoe "with no evidence of criminal activity," CAM at 3, for the purpose of preventing a hearing scheduled for the afternoon of December 9, 2009, from going forward. Based on these two assumptions -- neither of which is true -- IBC managed to conjure six different ways to charge Mr. Thomas with violations.

. . .

Each count will be addressed one at a time below. Nevertheless, because the facts underlying all six counts turn on the reasonableness and timing of the charges against Judge Donahoe, we will address those at the outset.

To suggest there is no evidence of criminal wrongdoing by Judge Donahoe is perhaps the biggest overstatement by IBC in a case full of them. As uncomfortable as it might make some to have to admit it, Judge Donahoe's conduct raised a legitimate inference that he was taking cases that did not belong to him, and keeping cases from which he should have recused himself, all for the purpose of ruling against the MCAO in corruption-related criminal cases. If that in fact was what he was doing, that is obstruction of justice under §13-2409. It also fits the definition of hindering under §13-2510(4). His reasons for doing so would not matter.

As for the timing of the charges, there is a perfectly benign explanation. While timing was an issue, the charges were not filed on December 9 to prevent the hearing from going forward. They were filed, in part, to stop what was perceived to be ongoing criminal conduct, and in part to ensure they would be available to announce at a press conference scheduled for the very purpose of shining a light on what Judge Donahoe was doing and planning to do. The other reason was because Mr. Thomas was concerned that if the charges were brought after Judge Donahoe ruled, they would appear to be retaliatory.

Factual underpinnings of the charges

The charges begin with Judge Donahoe's ruling on the motion to quash the grand jury subpoena to the County for documents relating to the Court Tower. Exhibit 56. A lot of time was spent at the hearing on the circumstances leading up to the filing and Judge Donahoe's ruling, so we will not recap it in detail here. Distilled:

1. Judge Donahoe refused to recuse himself, despite acknowledging that the appearance of impropriety standard required a judge to step-aside if "conduct would create in reasonable minds a perception that the judge ... engaged in other conduct that reflects adversely on the judge's ... impartiality,"[13] and despite the fact he was being asked to quash a grand jury subpoena that involved alleged criminal conduct in connection with the Court Tower, a facility being built with millions of taxpayer dollars specifically for the Superior Court, an institution of which he, as a member, held a position of authority as Presiding Criminal judge (the court department, not coincidentally, that would exclusively use the Court Tower). His reasoning that he had, "absolutely no interest in the court tower that would be affected in any way, let alone a substantial way by this litigation," ignores the "appearance" part of Canon 1.

. . .

[13]Tr. 10/5/11, p. 128

2. He disqualified the MCAO even though the only potential MCAO client anywhere in sight, the Board of Supervisors, was not the object of the criminal investigation, and, because it is not a jural entity, could never have been charged with a crime anyway. Ditto "County Administration," the ambiguously described "entity" to which the subpoena was actually directed.

Much of Judge Donahoe's reasoning is devoted to what he believed was the impropriety of investigating a county project in which the MCAO civil division had been involved. Yet, he did not cite, analyze or try to distinguish *State v. Brooks*, a case that was cited and discussed in the response to the motion to disqualify that was before him. Where was the evidence presented to Judge Donahoe that the MCAO's civil division gave legal advice on any aspect of the hire-Irvine-to-get-your-Court-Tower theory the prosecution was actually looking into or that client confidences were being used? For good measure, Judge Donahoe, seemingly gratuitously, made a point to quote the inflammatory appearance-of-evil language from *Latigue*.

3. Judge Donahoe refused to disqualify the Shugart Thomson firm, despite being advised in writing that the very lawyer making the motion, Tom Irvine, was himself a target of the grand jury investigation, and despite agreeing that the Board had the right to a conflict-free representation. The

judge's reasoning, it was "a matter between" Mr. Irvine and the Board, was not a legitimate excuse not to rule.

In short, Judge Donahoe kept a case from which he should have recused himself, and then wrongly kicked the MCAO off, in a matter that involved public corruption implicating Supervisor Stapley, among others.

Shortly thereafter, the so-called Wolfswinkel search warrant appeal events began. To recap, a search warrant had been served on the business premises of entities owned or controlled by Conley Wolfswinkel, a notorious figure who was convicted in the early 90s of multiple felonies involving check kiting. (He also has a billion dollar RICO judgment against him arising out his dealings with Charlie Keating's Lincoln Savings.) It had been learned that one of Mr. Wolfswinkel's companies was paying Supervisor Stapley a large sum of money every month, purportedly on an option. The subpoena sought information about that and other business dealings as part of the anti-corruption effort. As the Panel will recall, MACE received multiple tips about Mr. Stapley -- a person even Mr. Thomas's predecessor warned Mr. Thomas to "look out for." Tr. 10/26/11, pp. 30-1.

The search warrant was executed, and documents seized. Mr. Wolfswinkel engaged lawyers who sought to controvert the search warrant under §13-3922. Although the search warrant issued out of a justice court, Mr. Wolfswinkel's lawyers filed the motion in Superior Court. It was given a civil

cause number by the clerk's office, and was assigned to Judge Grant. Exhibit 287, Bates 3889. Nevertheless, Judge Donahoe, the then presiding criminal judge, somehow, curiously, ended up with the case. He dismissed the case, in toto, by minute entry dated March 27, 2009. *Id.*, Bates 3892-3.

When asked how he came to rule in a case assigned to Judge Grant, Judge Donahoe claimed the motion to controvert was, "the only part of the case that was mine[.]" Tr. 10/5/11, p. 112. Later in his testimony, Judge Donahoe claimed that the rest of the case involved sanctions against Ms. Aubuchon, "for disclosing some -- or violating a protective order or something. I don't remember all of the details of it, but I think that was Judge Grant. That was the other aspect of this case." Tr. 10/5/11, p. 112. Nevertheless, as noted, Judge Donahoe dismissed the action; there was no other part for Judge Grant (or any other judge) to handle. The case in which Judge Grant was reversed for imposing sanctions against Ms. Aubuchon was a completely separate lawsuit. Exhibit 501.

Mr. Wolfswinkel's lawyers then filed an action in the Lakeside Justice Court, the court that issued the search warrant. The clerk of the court assigned the matter a justice court number. Exhibit 523, Bates 10013. Proceedings were held; the court ruled; Mr. Wolfswinkel, unhappy with the ruling, appealed. The notice of appeal, which is filed in Justice Court, is exhibit 309.

An appeal from a Justice Court is handled as a "lower court appeal" in the Superior Court. Tr. 10/3/11, pp. 125-6; tr. 10/5/11, p. 116. Indeed, the Wolfswinkel search warrant appeal was given an "LC" cause number by a Superior Court clerk, confirming that it was considered a lower court appeal. Former Presiding Judge Mundell explained that during her tenure, lower court appeals was an actual calendar assignment. *Id.*, p. 125. The judge assigned to that calendar handled all lower court appeals.[14]

At the time the Wolfswinkel lower court appeal was pursued in Superior Court, Judge Donahoe was the Presiding Criminal judge, not the judge assigned to the lower court appeal calendar. Nevertheless, he issued a minute entry assigning the matter to himself. Exhibit 523, Bates 10011. Judge Donahoe's minute entry states that his reasoning for taking the case was that it "involve[d] a search warrant," which was true enough, but it was more accurately considered a lower court appeal. No explanation is offered in the minute entry why a seemingly garden-variety lower court appeal was being handled out of the ordinary course.

That Judge Donahoe self-assigned a case to himself, much less another one involving the MCAO's anti-corruption

[14]Judge Mundell did indicate that the lower court appeals calendar judge often sought help from others based on workload, *Id.*, pp. 126-7, but, Judge Donahoe did not claim to assign the Wolfswinkel search warrant appeal to himself on that basis.

efforts, raised eyebrows, but the notice of appeal (exhibit 309) shows that the Justice Court file[15] was filed by the Clerk at 5:00 p.m. Judge Donahoe's minute entry assigning the case to himself shows that it was entered forty-five minutes earlier, at 4:15. How did he assign an appeal to himself that had not yet even been filed, and did not come into existence for another forty-five minutes?

> [I]t was all routed to me, all of the pleadings. I gave it to the clerk, and it's filed it all at this time after I directed that a lower court appeal number be assigned to it to distinguish the first round from the second round. I didn't want the pleadings to get mixed up.
>
> So I directed the clerk of the court, when all these pleadings arrived in my office, to assign a lower court number appeal to it and file all this stuff in at the same time I did this minute entry to let everybody know that the case was back in front of me.

Tr. 10/5/11, p. 118.

Judge Donahoe's explanation does not account for the approximately 45 minute gap between the time his minute entry was issued and the time the clerk actually stamped the file in, a question that looms larger by virtue of Judge Donahoe's claim he directed the clerk to "file all this stuff in at the same time."

It also does not explain how Judge Donahoe's minute entry, issued before the file was stamped in, could have the

---

[15]Much like the practice in the Court of Appeals, the clerk of the court whose ruling is being appealed ships the entire file to the reviewing court.

cause number in it. Judge Donahoe claims not to recall if the file had the "LC" number stamped on it before it was delivered to his office by the clerk, or after he directed it to be filed. Tr. 10/5/11, p. 142. Nevertheless, his minute entry, generated on a computer sometime before 4:15 (as evidenced by the hand-written time notation) has the cause number typed into the minute entry. Judge Donahoe had to have the cause number from somewhere before his minute entry was typed.

The only explanation consistent with the timing is that the cause number was on the file by the time it arrived in Judge Donahoe's chambers. Which naturally raises the question: Why would a busy court clerk send a routine lower court appeal to the Presiding Criminal Judge for special handling, rather than stamp it in, and handle it in the ordinary course? This is Judge Donahoe's explanation:

> Q. Do you know how it is that the clerk's office delivered this file to your office before accepting it for filing?
>
> A. Yeah. It came in and dealt with a case I had previously handled, so it came back to me.
>
> Q. Someone in the clerk's office knew that this was something you had already ruled on, and that's the reason they brought it up to your office?
>
> A. My name is plastered all over the pleadings.

Id.

With all due respect to Judge Donahoe, his name is not "plastered all over" the file. We obtained a complete copy

of the file. Exhibit 523. The first twelve pages are minute entries issued by Judge Donahoe after he assigned the file to himself; the remaining balance of exhibit 523 (beginning with Bates 10013) would have been the actual file transmitted by the Justice Court, and the materials from which the Superior Court would supposedly be able to discern Judge Donahoe's prior involvement. We reviewed that file looking for any reference to Judge Donahoe's name. We found it only twice. To reinforce our point that Judge Donahoe's name was not "plastered all over the file," and that the two times it does appear are obscure (to say the least), we leave it to the Panel to try to find for itself the two references.

The manner in which Judge Donahoe seemed to go out of his way to assign the case to himself, raises legitimate questions about his motives. Nevertheless, the substance of Judge Donahoe's ruling only reinforced the notion that he was not conducting himself according to Hoyle. He did not just rule against the MCAO, although it seems more than coincidental. His minute entry reflects that he decided the case on his own, rather than treating the case as the appeal that it was, subject to the standard of review to be applied to justice court appeals.

The infamous motion-with-no-cause-number "Notice and Motion" (exhibit 137) was filed a few days before the Wolfswinkel search warrant ruling, but the hearing was set on it less than two weeks after the eye-popping ruling in the

Wolfswinkel search warrant action came down. Exhibit 137. The fact a hearing was even set was troubling for a whole host of reasons, including the fact there was no cause number on the "motion"; the motion (which lacked any substantive legal authority for the remedy sought) invaded secret grand jury proceedings; and, as pointed out in the State's response, the court was devoid of jurisdiction to even entertain the action.[16]

The inference that Judge Donahoe was bound and determined to once again (to put it in the vernacular) "stick it" to the MCAO became more overwhelming still once Judge Donahoe refused to honor the Rule 10.1 motion. Exhibit 151. Judge Donahoe claimed that he did not vacate the hearing, despite the filing of a Rule 10.1 motion, and despite the fact that every judicial officer asked testified that the filing of such a motion puts everything on hold until after the motion is decided, because he did not see the motion until after the hearing. Tr. 10/5/11, p. 150. When it was pointed out to him that the exhibit has his office's "date received" stamp, and that the stamp indicates the motion was received in his office in advance of the December 9 hearing, Judge Donahoe could only sheepishly repeat that he did not see the filing even though he had to admit it was in his office.

[16]The reasonableness of this belief is confirmed by the fact the judge who eventually handled the matter struck the "Notice and Motion" for the very reasons urged by the MCAO. Exhibit 170, Bates 1929.

His explanation might carry more weight, except that Ms. Aubuchon testified that she called Judge Donahoe's chambers, raised the pendency of the Rule 10.1 motion, but was told that Judge Donahoe was going forward with the hearing anyway. Tr. 10/25/11, pp. 183-4.

What does all of this mean? A properly instructed jury could have concluded from the evidence that Judge Donahoe was keeping cases, and assigning cases to himself that he should not have been hearing, for the purpose of ruling against the MCAO in political corruption cases involving Supervisor Stapley. Was there some quid pro quo? A jury of non-lawyers who did not know any of the players, and did not have any vested interest in, or partiality towards, the judiciary could think so. That jury would also have heard testimony from former Chief Deputy Hendershott about his coffeehouse conversation with Judge Mundell. The Panel has to set aside its natural affinity for the court system, and remember that a jury of laypersons, not fellow lawyers and judges, would have decided Judge Donahoe's guilt.

But it was not necessary for the MCAO to prove its theory of quid pro quo to secure an obstruction conviction. If Judge Donahoe was deliberately handling cases he should not have been for the purpose of ruling against the MCAO -- by then the other half of a most disharmonious criminal justice system -- that satisfies the elements of obstruction of justice and hindering under Arizona law.

Timing

The prospect of charging Judge Donahoe with a crime was first raised a week or so before the charges were actually brought. Recollections differ somewhat about the meeting's setting,[17] but all (including Ms. Marshall herself) are in agreement that Barbara Marshall, at the time a division chief and an experienced prosecutor, stated at one point that Judge Donahoe could be charged with a crime.[18] Tr. 10/25/11, pp. 174-7; Tr. 10/26/11, pp. 173-4; Tr. 09/19/11, p. 159.

The next meeting occurred on the afternoon on December 8, 2009, the day before Judge Donahoe was charged. Mr. Thomas, Ms. Aubuchon, Sheriff Arpaio and Mr. Hendershott attended. By this point, the group knew (from Ms. Aubuchon's call to Judge Donahoe's chambers) that Judge Donahoe was going forward with the hearing, notwithstanding the Rule 10.1 motion -- a fact that only added to the belief that Judge Donahoe was going to obstruct and hinder the anti-corruption efforts.

During the meeting, there was an extended discussion about the situation. The parties discussed the elements of

---

[17]Ms. Aubuchon recalls that it was "most likely" a Division Chiefs meeting. Tr. 10/25/11, p. 175. Mr. Thomas, on the other hand, recalls that it was a meeting called for the specific purpose of discussing the situation created by Judge Donahoe's conduct. Tr. 10/26/11, p. 173.

[18]Both Mr. Thomas and Ms. Aubuchon remember Ms. Marshall suggesting obstruction. Ms. Marshall says she suggested hindering prosecution. This is a distinction without a difference. The conduct fits both.

the crime and the ramifications of charging a sitting judge. A discussion about how to proceed -- whether by direct complaint or grand jury indictment -- also occurred. According to Mr. Hendershott, Ms. Aubuchon and Mr. Thomas, the decision to proceed by direct complaint was made because Judge Donahoe was engaging in ongoing criminal behavior. Tr. 10/13/11, pp. 78-9; tr. 10/26/11, pp. 181-2; tr. 10/25/11, p. 179. Mr. Thomas also wanted the charges to be filed before a press conference he had scheduled for the next day. Tr. 10/26/11, pp. 185-7.

In any event all agree that Mr. Thomas decided he wanted to take additional time to consider the charges, an act inconsistent with IBC's charge-him-to-cancel-the-hearing theory. Tr. 10/13/11, p. 79; tr. 10/26/11, pp. 178-9.

Why not wait until after Judge Donahoe held the hearing? Mr. Thomas explained that if he did that, and then went forward, it would look like he was charging Judge Donahoe with a crime in retaliation. Mr. Thomas was "damned if he did, damned if he didn't" to quote the old saw.

B. Knowingly bringing a criminal case without probable cause (Count 24)

The first count relating to the criminal prosecution of Judge Donahoe, count 24, charges a violation of ER 3.8(a). The rule does not make it a violation to bring a charge unsupported by probable cause; the rule instead prohibits bringing a charge "that the prosecutor knows is not supported

by probable cause." The distinction is important, of course, because IBC does not meet his burden merely by claiming probable cause as to the charges against Judge Donahoe was lacking.

To prove his case, IBC must show by clear and convincing evidence both that there was no probable cause to bring charges against Judge Donahoe and that Mr. Thomas knew that probable cause was lacking. We explained in the Background section the facts we contend gave rise to probable cause. If the Panel for whatever reason disagrees with our analysis, no violation occurred unless the Panel also concludes by clear and convincing evidence Mr. Thomas knew probable cause was lacking. We will address that in the paragraphs that follow, but it bears noting that if the Panel were to decide that Mr. Thomas, who relied on two experienced prosecutors in his office, genuinely, but perhaps unreasonably, thought probable cause existed, IBC has not proved the violation.

As noted, Mr. Thomas had the counsel of two senior prosecutors in his office. Although she now labels it a flippant comment, Ms. Marshall said what she said. She is the only one who now claims she was making a joke -- one that is so undeniably unfunny it strains credulity to label it as such after-the-fact. That is why Mr. Thomas took her seriously.

Ironically, Ms. Aubuchon, the other senior prosecutor upon whom Mr. Thomas relied, was more experienced than her

boss, Mr. Thomas. Mr. Thomas knew Ms. Aubuchon, and knew her reputation (which led one of the network television stations to do a report about her) from his brief time as a line prosecutor in the MCAO. Mr. Thomas felt he could rely on her. Was his reliance reasonable? We think so, but importantly, his reliance in fact occurred. He left the charging decisions to Ms. Aubuchon to try to minimize the false accusation -- leveled here anyway -- that he was politicizing the case against Judge Donahoe. If Ms. Aubuchon was mistaken about the appropriateness of the bribery charge, for example, Mr. Thomas did not know that.

In his proposed finding of fact 394, IBC claims that Cmdr. Stribling told Mr. Thomas on the evening of December 8 that Lt. Hargus and Det. Cooning had told him (Stribling) that there was no probable cause for the Donahoe complaint. Of course, this is the same Cmdr. Stribling who admitted on cross-examination to being "untruthful" to his boss, Mr. Thomas, on three separate occasions to avoid working on a case he wanted to avoid.

Det. Cooning's testimony is inconsistent with Cmdr. Stribling, the confessed prevaricator. Det. Cooning testified that he did not make the determination that probable cause was lacking because "that wasn't my job." Tr. 10/13/11, p. 151. When asked by the PDJ, Det. Cooning went on to say that he would have sworn to the Donahoe complaint

if he had done the investigation and knew the things in the probable cause statement to be true. *Id.*, p. 166.

Although he was on IBC's witness list, tellingly, Lt. Hargus was not called to corroborate Cmdr. Stribling's testimony. Why do you suppose that is?

Let us assume for a moment that Cmdr. Stribling really told Mr. Thomas (falsely) that two veteran police officers did not think probable cause existed to pursue charges against Judge Donahoe. If Cmdr. Stribling is to be believed, Mr. Thomas did nothing in response. What are the chances of that? The answer is zero.

IBC tries to make much of the fact that there was no police investigation ahead of time, but he never says what information an investigation would have yielded that Ms. Aubuchon did not already know. By the same token, is he saying that if there had been an investigation, no charge would have been pursued? Where is the proof of that? Whatever else an investigation might have turned up, it would not have changed the immutable facts we described in the initial part of this Section.

IBC casts as sinister the circumstances under which the Probable Cause statement was generated. But the Probable Cause statement is not (and is not intended to be) a reflection of the prosecutor's view of the case. It is intended to reflect what the police think. The fact that the Probable Cause statement in the Judge Donahoe case refers to

the disagreement he had with the Sheriff's Office over the transportation issue, while that issue is nowhere referenced in the complaint, demonstrates that.

The complaint verification is made on the basis of information or belief. Mr. Hendershott's judicial complaint contains a fair description of the information and beliefs that were held in the Sheriff's Office about the case against Judge Donahoe. It was certainly sufficient for the limited purposes of a Probable Cause statement, or form 4, is intended to fulfill -- giving the initial appearance judge sufficient information to set conditions of release. Mr. Thomas never saw it. The real question is whether the complaint itself, which does reflect the prosecutor's thinking, sets forth a case for which there is probable cause. We respectfully submit that Mr. Thomas reasonably thought that the complaint did.

C. Pursuing charges against Judge Donahoe for allegedly ulterior purposes (counts 25 and 30)

IBC charges Mr. Thomas with two separate violations growing out of IBC's theory that Mr. Thomas pursued criminal charges against Judge Donahoe for the ulterior purpose of forcing Judge Donahoe to vacate the December 9 hearing. In Count 25, IBC makes his favorite allegation -- that ER 4.4(a) was violated because the purpose was to burden or embarrass. In Count 30, the alleged effort to force Judge Donahoe to

cancel the December 9 hearing is cast as conduct prejudicial to the administration of justice, contrary to ER 8.4(d).

We explained in the factual underpinnings portion of this section why the case was pursued by criminal complaint, and the reasons for the timing of the filing. To recap, the case was pursued by criminal complaint because it was believed that Judge Donahoe was engaging in ongoing criminal behavior. Direct complaints are the route most commonly used to address that situation. Mr. Thomas also wanted the case filed before the press conference scheduled on the morning of December 9 -- the one scheduled to bring to the public's attention what Judge Donahoe was doing. Finally, had the charges been filed after the hearing, the case would become sidetracked with false accusations that the charges were retaliatory.

What needs to be emphasized here is that Mr. Thomas made the decision to proceed by direct complaint, and made the decision to have it filed before the hearing on December 9. If the question is motive, it is his motive that matters. The only direct evidence on his motive is his testimony about what he thought, believed and intended, and the testimony of Ms. Aubuchon and Mr. Hendershott who participated in conversations with Mr. Thomas about his thinking. Whatever the Sheriff's personnel might guess the motive was is not

even circumstantial evidence of it. None of them spoke with Mr. Thomas.[19] It is just more guesses heaped on supposition.

D. Allegedly criminal and dishonest conduct arising from charging Judge Donahoe (counts 26 and 28)

IBC claims that criminal and dishonest conduct occurred as the result of charging Judge Donahoe. In Count 28, IBC self-appoints himself a federal prosecutor. Evidently with a straight face, IBC claims Mr. Thomas violated ER 8.4(b) by engaging in criminal conduct involving "a conspiracy to injure, oppress, threaten or intimidate Judge Donahoe in the free exercise of his First Amendment rights" and in the "free exercise of his constitutional right to do his job as a judge[,]" in violation of 18 U.S.C. §241, a Reconstruction-era federal statute designed to protect the newly freed slaves from the KKK.

IBC made this criminal charge without an investigation by law enforcement (which was a "no-no", according to IBC, when Judge Donahoe was charged) and without a finding of probable cause by a grand jury, a requirement under federal law. The presumption of innocence is thrown out the window in favor of a presumption of guilt based on the guesses of persons who were not even witnesses to the decision-making process. The

---

[19]Of course, Cmdr. Stribling claims to have had a conversation with Mr. Thomas in the late afternoon of December 8 during which Mr. Thomas told him to make sure the complaint was filed by midmorning on December 9, but Cmdr. Stribiling did not say Mr. Thomas told him then, or ever, the reason for having the complaint filed by a certain time. Tr. 10/4/11. p. 91.

competent evidence is uncontroverted that the timing of the filing of the criminal charges was not to force Judge Donahoe to cancel the December 9, so the mens rea for both the conspiracy and the "injure, oppress, threaten or intimidate" elements are missing. All of this is sought to be done under a standard less than beyond a reasonable doubt and in contravention of Mr. Thomas's absolute jury trial right.

Putting aside for the moment that ER 8.4(b) does not make it a violation to engage in all conduct that violates any criminal laws, but rather only criminal conduct that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," how is the supposed conspiracy to prevent Judge Donahoe from going forward with the hearing on December 9 a violation of his civil rights? Other than parroting the conclusory language to that effect from the complaint, IBC never says. Just because Judge Donahoe might have spoken at the hearing does not make holding a hearing an exercise of free speech -- unless of course he was going to hold the hearing in Patriot's Park while carrying a picket sign. And where in the Constitution does it say that anyone has a constitutionally protected interest (not based on race, creed or religion) in doing his or her job? Whatever else IBC may hypothesize about the purposes behind the prosecution of Judge Donahoe, violating his civil rights was most assuredly not one of them.

The charge that Mr. Thomas engaged in dishonesty, misrepresentation, deceit or fraud in violation of ER 8.4(c) is equally hyperbolic. The complaint alleges that "Aubuchon arranged for a Deputy Sheriff, Gabe Almanza, to sign the criminal complaint under oath," an allegation we have previously debunked. The complaint goes on to charge that Mr. Thomas violated ER 8.4(c) because he had direct knowledge of what Ms. Aubuchon was allegedly doing, and ratified her conduct, another legally baseless violation-by-adoption charge.

E. Alleged conflict of interest (count 29)

Just in case charging Judge Donahoe with a crime allegedly knowing probable cause was lacking, to force him to vacate a hearing, was not unethical enough on its face if true, IBC gilds the lily by alleging Mr. Thomas and Ms. Aubuchon also had a conflict of interest prosecuting the case. What we have said about this theory, advanced both as to the Stapley II/Wilcox prosecutions and the RICO case, apply here. *See* section V(B) and VI(C).

Either the pursuit of the charges was proper, or it was not. The charges did not become any more improper (if indeed they were improper) because they were brought by someone with a personal interest any more than they become less improper if the case had been prosecuted by someone else in the MCAO without the alleged axe to grind. To say it yet again, the conflict rules require a substantial risk that the

representation would be materially limited. How does an improper prosecution ever become materially limited?

CONCLUSION

IBC has not proved by clear and convincing evidence either a violation of any Ethical Rule or a culpable mental state. The Panel should find in Mr. Thomas's favor on all counts against him, and enter an order in his favor exonerating him of all charges.

DATED this 17th day of January, 2012.

BROENING, OBERG, WOODS & WILSON, P.C.

By _____
Donald Wilson, Jr.

By _____
John W. Oberg

By _____
Terrence P. Woods

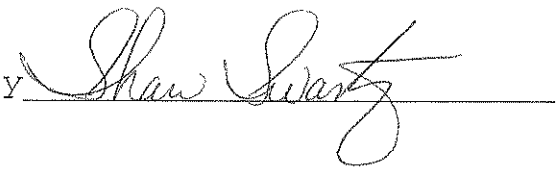
By _____
Brian Holohan
Attorneys for Respondent Thomas

COPY of the foregoing emailed
on January 17, 2012, to:

John S. Gleason
1560 Broadway, Suite 1800
Denver, CO 80202
IBC

Edward P. Moriarity, Esq.
MORIARITY, BADARUDDIN & BOOKE, LLC
124 West Pine Street, Suite B
Missoula, Montana 59802-4222
Counsel for Respondent Aubuchon

Scott H. Zwillinger, Esq.
ZWILLINGER GREEK ZWILLINGER & KNECHT PC
2425 E. Camelback Road, Suite 600
Phoenix, AZ 85016-4214
Counsel for Respondent Alexander

By 

APPENDIX

Count	Violation Alleged	Section	Page Number
1	ER 1.7(a)(2) by sending six opinion letters to MCBOS re hiring counsel	I.(D)	13
2	ER 1.6(a) by disclosing client confidences re the Keen and Dowling lawsuits and his pre-suit conversations with the Board members re legality of appointing outside counsel in June 2006 news release	I.(E)	19
3	ER 3.6(b) relating to Mr. Thomas's news release regarding the Keen and Dowling lawsuits	I.(F)	23
4	ER 4.4(a) by prosecuting Stapley I no substantial reason other than to burden and embarrass him	II.(A)	30
5	ER 1.7(a)(1) by representing one client (State) against another client (Stapley); ER 1.7(a)(2) because Thomas had a personal interest in charging Stapley	II.(C)	39
6	ER 3.3(a) arising from Ms. Aubuchon's representation in a court filing that a "Chinese wall" existed between criminal and civil divisions;	I.(A)	7
7	ER 3.3(a) arising from Ms. Aubuchon's misstatement in an argument heading that Judge Fields had filed a Bar charge against Mr. Thomas;	I.(B)	10
9	ER 8.4(d) because Supervisor Stapley was charged with 44 crimes allegedly barred by statute of limitations	II.(B)	35

20	ER 8.4(d) Suing four judges in the RICO suit for carrying out their duties was prejudicial to the administration of justice	VI.(A)	55
21	ER 1.7(a)(2) bringing criminal charges against Mary Rose Wilcox and the same time the RICO suit was pending ER 1.7(a)(2) because Mr. Thomas's prosecution of Supervisor Wilcox involved a personal interest	V.(B)	51
22	ER 4.4(a) indictments in Stapley II and Wilcox had no substantial purpose other than to embarrass or burden	V.(A)	49
23	ER 1.7(a)(2) bringing Stapley II while suing him in a civil action; ER 1.7(a)(2) because Mr. Thomas's prosecution of Supervisor Stapley in Stapley II involved a personal interest	V.(B)	51
24	ER 3.8(a) prosecuted a charge they knew was not supported by probable cause against Judge Donahoe	VII.(B)	74
25	ER 4.4(a) no substantial purpose other than to burden or embarrass Judge Donahoe by charging him with a crime	VII.(C)	78
26	ER 8.4(c) filing "false" charges against Judge Donahoe	VII.(D)	80
27	ER 8.4(b) engaged in perjury by knowing the Deputy who signed criminal complaint was himself committing perjury	I.(C)	11

28	8.4(b) conspired to injure, oppress, threaten or intimate Judge Donahoe's 1st amendment rights in violation of 18 U.S.C. §241	VII.(D)	80
29	ER 1.7(a)(2) conflict of interest because Mr. Thomas had a pending civil case against Donahoe at the time they were prosecuting him ER 1.7(a)(2) because Mr. Thomas had a personal interest in the Judge Donahoe prosecution	VII.(E)	82
30	ER 8.4(d) by charging Donahoe with a crime to force his recusal, Mr. Thomas engaged in conduct prejudicial to the administration of justice	VII.(C)	78
31	ER 1.7(a)(2) conflict by pursuing grand jury investigation of Donahoe, Irvine, Kunasek, Smith and Wilson at the same time they were defendants in the RICO case	IV.(B)	47
33	Rule 53(d) and (f) All three filed frivolous and meritless motions (and later meritless Special Actions) intended to delay, obstruct and burden the process of the screening investigation; not one of the Respondents "fully and forthrightly answered the allegations against him or her[.]"	III.	43